12–15–92
Vol. 57 No. 241
Pages 59275–59800

Federal Register

Tuesday
December 15, 1992

FEDERAL REGISTER Published daily, Monday through Friday, (not published on Saturdays, Sundays, or on official holidays), by the Office of the Federal Register, National Archives and Records Administration, Washington, DC 20408, under the Federal Register Act (49 Stat. 500, as amended; 44 U.S.C. Ch. 15) and the regulations of the Administrative Committee of the Federal Register (1 CFR Ch. I). Distribution is made only by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

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The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 530

RIN 3206–AE22

Pay Rates and Systems (General); Special Salary Rate Schedules for Recruitment and Retention

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing final regulations to implement provisions of the Federal Employees Pay Comparability Act of 1990 (FEPCA) related to the Government's special pay authority. Section 5305 of title 5, United States Code, as amended by FEPCA, substantially increases the Government's flexibility to authorize special salary rates, as compared with the statutory authority formerly contained in 5 U.S.C. 5303. These flexibilities became effective on February 3, 1991, under Executive Order 12748 of February 1, 1991. The final regulations allow OPM to approve special salary rates when the Government is experiencing, or is likely to experience, recruitment or retention problems caused by higher non-Federal sector pay, as well as by a number of other circumstances; and allow those rates to be established at higher pay levels than previously permitted.

OPM is also issuing final rules to implement the decision of the U.S. District Court for the District of Columbia (*National Treasury Employees Union* v. *Newman*, Number 83–0279 (D.D.C. June 28, 1991)), in which the court ordered OPM to promulgate a conversion rule for adjusting the pay schedules of employees paid special salary rates as required by 5 U.S.C. 5305(f) and consistent with the guidelines set forth in the decision.

EFFECTIVE DATE: January 14, 1992.

FOR FURTHER INFORMATION CONTACT: William M. Gualtieri, (202) 606–1413.

SUPPLEMENTARY INFORMATION: OPM published interim regulations at 56 FR 20334 on May 3, 1991, to implement provisions of FEPCA related to the Government's special salary rates program. The Federal Employees Pay Comparability Act of 1990 (Pub. L. 101–509, November 5, 1990) gives the Government authority to establish special salary rates under a wider variety of circumstances than was previously allowed. The following are the significantly expanded flexibilities permitted under FEPCA:

- Special salary rates may be established based on actual or anticipated staffing problems for any civilian position under any pay system established by or under Federal statute within the executive branch.
- Special salary rates may be established when the staffing problem is caused by higher non-Federal pay rates, remote location or area, undesirable working conditions, or any other circumstances. The final regulations also allow for consideration of higher Federal pay rates established under independent statutory authority.
- The highest rate at which the minimum rate of a special rate schedule may be set has been increased to 30 percent above the maximum rate of a grade. Previously, the limit was the maximum rate of a grade.
- The GS–10, step 1, limitation on the computation of overtime pay now includes all special rates of pay established for that grade. The final regulations set forth the criteria OPM will use for establishing a GS–10 special salary rate for overtime pay computation and certain other non-staffing purposes when one would otherwise not have been established to alleviate staffing problems.

The requirement to change the existing special salary rate regulations to conform with FEPCA has given OPM an opportunity to update other provisions of the prior regulations.

The first provision appears in the final regulations exactly as it appeared in the interim regulations. It changes agency certification levels for approving special salary rate requests. Individuals designated to act on behalf of the agency head may now approve special salary rate requests covering fewer than 1,000 positions or costing less than $4 million. This change means that involvement of an agency head will be required only in the highest impact special rate requests. This should reduce the time needed to process such requests.

The second provision was published by OPM on June 15, 1992 (57 FR 26619), as a set of proposed rules with a request for comments. The proposed rules were designed to implement a court decision (cited in the "Summary") for adjusting the pay schedules of employees paid special salary rates when the underlying statutory pay schedules are adjusted. The proposed rules replaced interim regulations 5 CFR 530.307(a) because it contained an automatic adjustment mechanism that the court concluded would not be proper. In addition, OPM proposed to amend interim regulation 5 CFR 530.304, providing for an annual review of special salary rate schedules, in order to have it conform with the court's criteria.

Comments on the Interim Regulations

We received four comments on the interim regulations, three from Federal agencies and one from a union. The union's comment and the comment of one of the agencies concern the provision described above dealing with the conversion rule for adjusting the pay schedules of employees paid special salary rates. The agency was concerned with the mechanics of the rule, while the union expressed concern that the interim rule does not "prescribe methods for adjusting special salary schedules to guarantee that special rate employees keep pace with regular rate employees, but that they do not receive duplicative increases." Both of these comments deal with the automatic schedule alignment rule, which has since been rescinded.

One agency commented that OPM should in certain limited situations delegate to agency heads the authority to approve special salary rates. While we have considered this issue, we believe it would not be in the best interest of the Government to delegate special salary rates authority to agencies. We believe OPM plays an important role in assuring that covered Federal agencies are paying uniform rates to Federal employees performing identical work in specified grades and locations.

Another agency provided comments on three issues. The first two suggested

that (1) OPM should provide examples of the documentation we would expect to see before approving special rates based on likely staffing problems, and (2) OPM should clarify how it will consider many of FEPCA's new pay flexibilities, such as above-minimum entry rates, recruitment and relocation bonuses, and retention allowances, before approving special rates. We agree that OPM should provide additional information regarding these issues, but we believe this information can be most effectively communicated by interagency memoranda rather than by regulation. For example, we issued an Interagency Advisory Group memorandum on October 24, 1991, that dealt specifically with the relationship between special salary rates and the FEPCA flexibilities. We expect there will be other formal and informal communications between OPM and agencies in the future as OPM and agencies again experience operating in the new environment.

The last issue this agency was concerned with had to do with the criteria OPM would use to establish GS–10 special rates for overtime and certain other non-staffing purposes. The agency envisioned only two situations in which the criteria could be applied—where special rates are authorized only for grades below GS–10 and where they are authorized for grades GS–9 and GS–11, but not GS–10. In these situations the agency did not see the need for the criterion we established dealing with the need to avoid pay alignment problems that would result from applying the two-step promotion rule in 5 U.S.C. 5334(b). However, we believe the provision in question is needed for us to be prepared to deal with any situation requiring establishing a GS–10 special rate for non-staffing purposes. If either of the two provisions does not apply in one instance, it may be completely appropriate in other unforeseen instances. Further, the interim regulations recognized that there may be instances in which one of the provisions might not apply by stating that OPM will consider the provisions "as appropriate in each situation."

Comments on the Proposed Regulations

We received one telephone comment on the proposed regulations from a Federal agency (later followed by a written comment that was received after the end of the comment period), one comment from another Federal agency, and two comments from individuals. One Federal agency and both individuals were concerned about applying 5 CFR 530.307 in cases in which a special salary rate schedule that is well above the underlying statutory schedule is terminated. In such cases, the proposed regulation makes it appear that an employee's pay could be reduced, except that the pay retention regulations in part 536 would bar such actions. It is not our intention to reduce employees' pay in such situations, and we have revised 5 CFR 530.307 to make this clear.

One of the agencies suggested language to simplify 5 CFR 530.304. While we agree that the suggested language does simplify the regulation, we feel that it does so at the expense of being less precise. Therefore, we have not adopted the suggested changes. Both agencies asked us to clarify the meaning of "numerical rank" as used in 5 CFR 530.307. Within the General Schedule pay system, "numerical rank" means "step." "Step" is not used in place of "numerical rank" in the regulation because we concluded it would be more appropriate to use a more generic term, since it is possible for OPM to establish special salary rates for (1) any statutory pay system, or (2) any other pay system established by or under Federal statute for civilian positions within the executive branch.

One of the individuals who commented identified himself as an employee who is also a member of the class in the lawsuit *NTEU* v. *Newman*. The employee contends that it was premature for OPM to issue the proposed regulations prior to the final decision of the court. We disagree, since the U.S. district court's June 28, 1991, decision requires OPM to issue such regulations. In other comments, the employee and another individual indicated their support for NTEU's position in the lawsuit and contended that OPM's proposed regulations run counter to the appeals and district courts' interpretation of the statute. NTEU has argued that the review of special salary rates that OPM conducts annually does not conform with legal requirements (now contained in 5 U.S.C. 5305(f)) that require that there be rules for converting special rates to the rates on new statutory pay schedules. We believe the rules we have proposed do indeed conform with the statutory requirements as interpreted by the appeals and district courts, and this conclusion has been affirmed by a recent decision of the district court (*NTEU* v. *Newman*, C.A. No. 83–0279 (D.D.C. Sept. 14, 1992)).

Finally, a conforming editorial change has been made in §§ 530.303(a) and 530.305 to clarify that special salary rates are established and adjusted to overcome existing or likely significant handicaps in the "recruitment or retention" of well-qualified personnel.

E.O. 12291, Federal Regulation

I have determined that this is not a major rule as defined under section 1(b) of E.O. 12291, Federal Regulation.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they apply only to Federal agencies and employees.

List of Subjects in 5 CFR Part 530

Government employees, Reporting and recordkeeping requirements, Wages.

U.S. Office of Personnel Management.

Douglas A. Brook,

Acting Director.

Accordingly, the interim rule amending 5 CFR part 530, published at 56 FR 20334 on May 3, 1991, is adopted as final with the following changes.

PART 530—PAY RATES AND SYSTEMS (GENERAL)

1. The authority citation for 5 CFR part 530 continues to read as follows:

Authority: 5 U.S.C. 5305; E.O. 12748, 56 FR 4521.

§ 530.303 [Amended]

2. In § 530.303(a), remove the words "recruitment and retention" and insert the words "recruitment or retention" in their place.

3. Section 530.304 is revised to read as follows:

§ 530.304 Annual review.

(a) Prior to an adjustment in the scheduled rates of pay for one or more grades or levels for which special rates have been authorized under 5 U.S.C. 5305, but at least annually, OPM shall review special salary rate schedules to determine whether the factors in § 530.303 of this part and paragraph (b) of this section require those schedules to continue, and, if they are to continue, the extent to which they are to be adjusted, if at all.

(b) In addition to the factors in § 530.303 of this part, OPM shall consider, for the purpose of making the determination required by paragraph (a) of this section—

(1) The former non-special pay rates of the special rate employees to ensure that any adjustment in the special rates of pay would not cause those rates to fall below the non-special rates of pay to which the special rate employees would otherwise have been entitled;

(2) The likelihood that the factors leading to a statutory adjustment in pay will affect special rate employees as well; and

(3) Other special rate pay adjustments that occurred prior to the date of the anticipated statutory pay adjustment.

(c) Any adjustment in the special rates of pay shall be based on the factors in paragraphs (a) and (b) of this section and shall not be made solely for mechanical reasons or for the purposes of providing automatic adjustments. Any adjustment must be based on the pay OPM determines is necessary in a given occupation and area to recruit or retain the special rate employees.

(d) In conducting the annual review, OPM shall designate lead agencies for assistance in coordinating the collection of relevant data. All agencies are responsible for submitting complete supporting data upon request to OPM or the lead agency, as appropriate.

(e) When special rates are adjusted as a result of this review, an employee's pay shall be fixed in the same manner as provided in § 530.307 of this part.

§ 530.305 [Amended]

4. Remove the words "recruitment and retention" and insert the words "recruitment or retention" in their place.

5. Section 530.307 is revised to read as follows:

§ 530.307 Effect of an adjustment in scheduled rates of pay.

(a) Except as provided in paragraphs (b) and (c) of this section, when an employee was receiving a special rate immediately before the effective date of an adjustment in scheduled rates of pay, the employee shall receive on that effective date the rate of basic pay for the numerical rank in the new special rate range established under § 530.304 of this part for the employee's grade or level that corresponds to the numerical rank of the special rate the employee was receiving immediately before that effective date. However, in the case of an employee who becomes eligible for pay retention because a special rate schedule has been reduced under § 530.304 of this part, the employee shall receive a rate of basic pay determined under § 536.205(b) of this chapter.

(b) If a special rate range is terminated under § 530.304 of this part, an employee who was receiving a special rate immediately before the effective date of an adjustment in scheduled rates of pay shall receive on that effective date the numerical rank in the new statutory pay schedule for the employee's grade or level that corresponds to the numerical rank of the special rate the employee was receiving immediately before that effective date. However, in the case of an employee who becomes eligible for pay retention because the employee's pay would otherwise be reduced under § 530.304 of this part, the employee shall receive a rate of basic pay determined under § 536.205(b) of this chapter.

(c) In the case of an employee in a position under the Performance Management and Recognition System who was receiving a special pay rate immediately before the effective date of an adjustment in scheduled rates of pay, the employee shall receive on that effective date a rate of basic pay determined under § 540.106 of this chapter. However, in the case of an employee who becomes eligible for pay retention because the employee's pay would otherwise be reduced under § 530.304 of this part, the employee shall receive a rate of basic pay determined under § 536.205(b) of this chapter.

[FR Doc. 92–30414 Filed 12–14–92; 8:45 am]
BILLING CODE 6325–01–M

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5 CFR Parts 532, 550, and 551

RIN 3206–AE32

Pay Administration Under the Fair Labor Standards Act; Overtime Pay Provisions

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing final regulations to implement section 210 of the Federal Employees Pay Comparability Act of 1990 (FEPCA). The amendments made by section 210 eliminate the requirement to perform dual overtime pay computations for employees covered by the overtime pay provisions of the Fair Labor Standards Act of 1938 (FLSA) and title 5, United States Code. Section 210 of FEPCA provides that, for the purpose of calculating overtime pay under the FLSA, hours in a paid nonwork status shall be deemed to be hours of work. Thus, overtime pay for nonexempt employees is computed and paid only under the FLSA.

EFFECTIVE DATE: The first day of the first pay period beginning on or after January 14, 1993.

FOR FURTHER INFORMATION CONTACT: James R. Weddel, (202) 606–2858.

SUPPLEMENTARY INFORMATION: Section 210 of the Federal Employees Pay Comparability Act of 1990 (FEPCA) eliminates the need to calculate and compare an FLSA nonexempt employee's overtime pay entitlement under two laws in order to pay the greater overtime benefit. Instead, employees who are nonexempt under the Fair Labor Standards Act of 1938, as amended, always receive overtime pay under the FLSA, as provided in part 551 of title 5, Code of Federal Regulations.

Interim regulations to implement section 210 of FEPCA were published in the **Federal Register** on May 3, 1991 (56 FR 20339). The amendments made by section 210 and the interim regulations were effective on May 4, 1991. Comments were received from five Federal agencies and two labor organizations. These comments, as well as certain changes and clarifications of the regulations, are summarized below.

The interim regulations are adopted as final with the changes shown below, except for 5 CFR 550.103(j), 550.111(d)(2), and 550.113(a), which were revised and adopted as final when final regulations on special pay adjustments for law enforcement officers became effective, on the first day of the first pay period beginning on or after January 1, 1992 (57 FR 2431).

Federal employees who are exempt from the FLSA, but covered by the overtime pay provisions of title 5, United States Code, continue to have their overtime pay benefit calculated and paid under the title 5 provisions, as provided in part 532 (for prevailing rate employees) or part 550 (for General Schedule employees) of title 5, Code of Federal Regulations, as applicable.

Employee Coverage Under Part 550

Three agencies commented that the interim regulations improperly applied the changes in section 210 of FEPCA to some employees who are not covered by sections 5542 through 5544 of title 5, United States Code. The commenters stated that the regulatory changes implementing section 210 should not apply to members of the United States Secret Service Uniformed Division or the United States Park Police or to employees paid from nonappropriated funds in instrumentalities under the jurisidiction of the armed forces. (See 5 U.S.C. 2105(c) and 5541(2)(iv).)

OPM agrees with these observations. Section 210 of FEPCA applies only to employees who are covered by sections 5542 through 5544 of title 5, United States Code. Therefore, we have amended the regulations to clarify that the changes required by section 210 do not apply to employees who are not covered by sections 5542 through 5544 of title 5. (See revised § 551.401(b) and new § 551.501(a)(4).)

Overtime Pay Under Other Statutes

One agency commented that while comparison of overtime pay entitlements under title 5 and the FLSA is no longer required, it continues to be necessary to make a comparison for those Federal employees who are covered by the overtime pay provisions of both the FLSA and another non-title 5 statute. Those employees will continue to be paid under the authority that provides the greater overtime pay benefit. Therefore, OPM has revised 5 CFR 551.513 to clarify this point.

Employees Covered by 7(k) Overtime Standards

One agency commented that an unintended consequence of the interim regulations was to reduce overtime pay for fire inspectors who are covered by the 53-hour overtime standard established under section 7(k) of the FLSA for employees engaged in fire protection activities. The agency noted that prior to implementation of FEPCA, fire inspectors on a 40-hour per week tour of duty earned overtime pay under title 5, United States Code, for hours of work in excess of 40 hours per week, provided they were not being paid annual premium pay. However, the interim regulations do not permit payment of overtime pay under title 5 for nonexempt employees and preclude payment of overtime pay under the FLSA on the basis of hours or work in excess of 40 hours in a workweek for an employee engaged in fire protection or law enforcement activities.

Section 7(k) of the FLSA establishes special overtime standards for employees engaged in fire protection and law enforcement activities. Nevertheless, it is within the administrative authority of OPM to determine that section 7(k) need not be applied to a specific category of employees is (1) the application of the special provision would result in inequitable pay treatment for some employees in comparison with other employees performing similar duties, and (2) the administrative costs involved in complying with the special provision would exceed the difference in the overtime costs involved. Since the groups of employees affected by this circumstance were covered by the 40-hour per week overtime standard that applied under title 5 prior to the effective date of section 210 of FEPCA, we believe both of the above criteria are satisfied in comparison to the situation that existed at that time. Therefore, to avoid a reduction in overtime pay entitlements as a result of the implementation of FEPCA, OPM has revised the regulations to provide that employees engaged in fire protection and law enforcement activities must receive overtime pay for work in excess of 40 hours in a workweek, provided they do not receive annual premium pay under section 5545(c)(1) or (2) of title 5, United States Code. (See §§ 551.501(a)(5) and 551.541(a).)

However, if employees engaged in fire protection or law enforcement activities had received overtime pay under title 5 prior to FEPCA, their meal periods would not have been included as hours of work. Therefore, OPM has also revised the regulations to clarify that if employees engaged in fire protection or law enforcement activities are not receiving annual premium pay and are being paid overtime pay for hours of work in excess of 40 hours in a workweek, meal periods may not be included in determining their hours of work. In addition, the regulations have been amended to indicate that Federal agencies may deduct up to 8 hours out of each 24-hour shift for sleep and meal periods under the two-thirds rule for firefighters who are performing standby duty but are not receiving annual premium pay for that duty. (See §§ 551.411(c), 551.432(b), and 551.541(b).)

One labor organization commented that the interim regulations did not include the 7(k) FLSA hours of work overtime standards and that a literal reading of the regulations could lead to the conclusion that employees engaged in fire protection and law enforcement activities may not receive overtime pay at all. Since the overtime standards may be revised from time to time, we have not included them in the final regulations. However, it is not OPM's intent to deny overtime pay to these employees under the FLSA. The overtime standards for 7(k) employees are referenced in § 551.541(a) and included in Federal Personnel Manual guidance.

"Suffered and Permitted" Work

One labor organization commented that under the FLSA and 5 U.S.C. 5542(c), overtime work includes work which is "suffered and permitted" and that the interim regulations did not permit overtime compensation for work in excess of 8 hours in a day that is suffered and permitted. However, 5 U.S.C. 5542(c) does not provide that overtime work includes work which is "suffered and permitted." The commenter noted that under the interim regulations employees may not receive overtime compensation on the basis of hours of work in excess of 8 hours in a day that are not overtime hours of work under title 5, Code of Federal Regulations.

While title 5, United States Code, has been amended by FEPCA to require overtime compensation for hours of work in excess of 8 hours in a day for nonexempt employees, the FLSA concept of "suffered and permitted" hours of work has not been applied by FEPCA to hours of work under title 5. The 8-hour daily standard is included under title 5, not under the FLSA, and therefore hours of work that are "suffered and permitted," but not ordered and approved, cannot be applied towards the 8-hour daily overtime standard. In all cases, however, those hours of work which are "suffered and permitted" will be creditable against the applicable weekly overtime standard under the FLSA for nonexempt employees. Therefore, OPM has not amended the regulations. (See also FPM Letter 551–24, January 14, 1992.)

Miscellaneous

An employee commented that § 550.112(i) of the interim regulations properly belongs in part 532 because it deals with hours of work for prevailing rate (wage) employees. OPM has removed this provision from part 550 and added it to part 532. (See § 532.503(f).)

OPM has also amended the definition of "rate of basic pay" in the severance pay regulations to include special pay adjustments for law enforcement officers. This conforming amendment was inadvertently omitted when final regulations on special pay adjustments for law enforcement officers were published in the **Federal Register** on January 22, 1992. (See § 550.703 and 57 FR 2431.)

Implementation of the Interim Regulations

One agency commented that it had difficulty issuing implementing instructions by the effective date of the interim regulations—May 4, 1991. However, by statute this date was the last possible effective date for section 210.

FPM Guidance

One agency commented that "information on these subjects is presented in very difficult phraseology" and recommended that "the text include practical examples which would crystalize the concepts for application to field activity problems." OPM has issued detailed FPM guidance explaining these regulations and providing specific examples. (See FPM Letter 551–24, January 14 1992.)

E.O. 12291, Federal Regulation

I have determined that this is not a major rule as defined under section 1(b) of E.O. 12291, Federal Regulation.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they apply only to Federal agencies and employees.

List of Subjects

5 CFR Part 532

Administrative practice and procedure, Freedom of information, Government employees, Reporting and recordkeeping requirements, Wages.

5 CFR Part 550

Administrative practice and procedure, Claims, Government employees, Wages.

5 CFR Part 551

Government employees, Wages.

U.S. Office of Personnel Management.

Douglas A. Brook,

Acting Director.

Accordingly, the interim rule amending 5 CFR parts 532, 550, and 551, which was published at 56 FR 20339 on May 3, 1991, is adopted as final with the following changes:

PART 532—PREVAILING RATE SYSTEMS

1. The authority citation for part 532 continues to read as follows:

Authority: 5 U.S.C. 5343, 5346; § 532.707 also issued under 5 U.S.C. 552, Freedom of Information Act, Public Law 92–502.

2. In § 532.503, paragraph (f) is added to read as follows:

§ 532.503 Overtime pay.

* * * * *

(f) For an employee covered by 5 U.S.C. 5544, hours in a standby or on-call status or while sleeping or eating shall not be credited for the purpose of determining hours of work in excess of 8 hours in a day.

PART 550—PAY ADMINISTRATION (GENERAL)

3. The authority citation for subpart A of part 550 is revised to read as follows:

Authority: 5 U.S.C. 5304 note, 5305 note, 5541(2)(iv), 5548 and 6101(c); E.O. 12748, 3 CFR 1991 Comp., p. 316.

§ 550.112 [Amended]

4. In § 550.112, paragraph (i) is removed, and paragraph (j) is redesignated as paragraph (i).

5. The authority citation for subpart G of part 550 is revised to read as follows:

Authority: 5 U.S.C. 5595; E.O. 11257, 3 CFR 1964–1965 Comp., p. 357.

6. In § 550.703, the definition of "rate of basic pay" is revised to read as follows:

§ 550.703 Definitions.

* * * * *

Rate of basic pay means the rate of pay fixed by law or administrative action for the position held by an employee, including, as applicable, annual premium pay for standby duty under 5 U.S.C. 5545(c)(1), night differential for prevailing rate employees under 5 U.S.C. 5343(f), and any interim geographic adjustment or special pay adjustment for law enforcement officers under section 302 or 404 of the Federal Employees Pay Comparability Act of 1990 (Pub. L. 101–509), respectively, or locality-based comparability payment under 5 U.S.C. 5304, but not including additional pay of any kind.

* * * * *

PART 551—PAY ADMINISTRATION UNDER THE FAIR LABOR STANDARDS ACT

7. The authority citation for part 551 is revised to read as follows:

Authority: 5 U.S.C. 5542(c); Sec. 4(f) of the Fair Labor Standards Act of 1938, as amended by Public Law 93–259, 88 Stat. 55 (29 U.S.C. 204f).

8. In § 551.401, paragraph (b) is revised to read as follows:

§ 551.401 Basic principles.

* * * * *

(b) For an employee, as defined in 5 U.S.C. 5541(2), hours in a paid nonwork status (e.g., paid leave, holidays, compensatory time off, or excused absences) are "hours of work" under this part.

* * * * *

9. In § 551.411, paragraph (c) is revised to read as follows:

§ 551.411 Workday.

* * * * *

(c) *Bona fide* meal periods shall not be considered hours of work, except for employees engaged in fire protection or law enforcement activities who receive compensation for overtime hours of work under 5 U.S.C. 5545(c) (1) or (2). However, for employees engaged in fire protection or law enforcement activities who have periods of duty of more than 24 hours, meal periods may be excluded from hours of work by agreement between the employer and the employee.

10. In § 551.432, paragraph (b) is revised to read as follows:

§ 551.432 Sleep time.

* * * * *

(b) For employees engaged in law enforcement activities, as well as employees engaged in fire protection activities who receive annual premium pay under 5 U.S.C. 5545(c)(1), the exclusion of sleep time is appropriate for tours of duty of more than 24 hours only. For employees engaged in fire protection activities who perform standby duty and do not receive annual premium pay, Federal agencies may deduct up to 8 hours out of each 24-hour shift for sleep and meal periods. However, paragraphs (a)(2) and (a)(3) of this section still apply to employees engaged in law enforcement or fire protection activities.

* * * * *

11. In § 551.501, paragraph (a) is revised to read as follows:

§ 551.501 Overtime pay.

(a) An agency shall compensate an employee who is not exempt under subpart B of this part for all hours of work in excess of 8 in a day or 40 in a workweek at a rate equal to one and one-half times the employee's hourly regular rate of pay, except that an employee shall not receive overtime compensation under this part—

(1) On the basis of periods of duty in excess of 8 hours in a day when the employee receives compensation for that duty under 5 U.S.C. 5545(c) (1) or (2);

(2) On the basis of hours of work in excess of 8 hours in a day that are not overtime hours of work under § 410.602 of this chapter, part 532 of this chapter and 5 U.S.C. 5544, or part 550 of this chapter;

(3) On the basis of hours of work in excess of 8 hours in a day for an employee covered by 5 U.S.C. 5544 for any hours in a standby or on-call status or while sleeping or eating;

(4) On the basis of hours of work in excess of 8 hours in a day for an individual who is not an employee, as defined in 5 U.S.C. 5541(2), for purposes of 5 U.S.C. 5542, 5543, and 5544.

(5) On the basis of hours of work in excess of 40 hours in a workweek for an employee engaged in fire protection or law enforcement activities when the employee receives compensation for those hours of work under 5 U.S.C. 5545(c) (1) or (2);

(6) For hours of work that are not "overtime hours," as defined in 5 U.S.C. 6121, for employees under flexible or compressed work schedules;

(7) For hours of work compensated by compensatory time off under § 551.531 of this part; and

(8) For fractional hours of work, except as provided in § 551.521 of this part.

* * * * *

12. Section 551.513 is revised to read as follows:

§ 551.513 Entitlement to other forms of pay.

Overtime pay under this subpart shall be paid in addition to all pay, other than overtime pay, to which the employee is entitled under title 5, United States Code, or any other authority. An employee entitled to overtime pay under this subpart and overtime pay under any authority outside of title 5, United States Code, shall be paid under whichever authority provides the greater overtime pay entitlement in the workweek.

13. In § 551.541, paragraphs (a) and (b) are revised to read as follows:

§ 551.541 Employees engaged in fire protection activities or law enforcement activities.

(a) An employee engaged in fire protection activities or law enforcement activities shall be paid at a rate equal to one and one-half times the employee's hourly regular rate of pay for those hours in a tour of duty which exceed the overtime standard for a work period specified in section 7(k) of the Act or which are in excess of 40 hours in a workweek for such an employee who does not receive compensation for those hours of work under 5 U.S.C. 5545 (c)(1) or (c)(2).

(b) The "tour of duty" of an employee engaged in these activities shall include all time the employee is on duty. Meal periods and sleep periods are included in the tour of duty except as otherwise provided in §§ 511.411(c) and 551.432(b) of this part.

* * * * *

[FR Doc. 92–30415 Filed 12–14–92; 8:45 am]
BILLING CODE 6325–01–M

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 907

[Navel Orange Regulation 740]

Navel Oranges Grown in Arizona and Designated Part of California

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This regulation establishes the quantity of California-Arizona navel oranges that may be shipped to domestic markets during the period from December 11 through December 17, 1992. Consistent with program objectives, such action is needed to establish and maintain orderly marketing conditions for fresh California-Arizona navel oranges for the specified week. Regulation was recommended by the Navel Orange Administrative Committee (Committee), which is responsible for local administration of the navel orange marketing order.

EFFECTIVE DATE: Regulation 740 (7 CFR 907.1040) is effective for the period from December 11 through December 17, 1992.

FOR FURTHER INFORMATION CONTACT: Christian D. Nissen, Marketing Specialist, Marketing Order Administration Branch, Fruit and Vegetable Division, Agricultural Marketing Service, U.S. Department of Agriculture, room 2523–S, P.O. Box 96456, Washington, DC 20090–6456; telephone: (202) 720–5127; or Robert Curry, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Division, Agricultural Marketing Service, U.S. Department of Agriculture, 2202 Monterey Street, suite 102B, Fresno, California 93721; telephone: (209) 487–5901.

SUPPLEMENTARY INFORMATION: This final rule is issued under Marketing Order No. 907 (7 CFR Part 907), as amended, regulating the handling of navel oranges grown in Arizona and designated part of California. This order is effective under the Agricultural Marketing Agreement Act of 1937, as amended, hereinafter referred to as the "Act."

This final rule has been reviewed by the Department of Agriculture (Department) in accordance with Departmental Regulation 1512–1 and the criteria contained in Executive Order 12291 and has been determined to be a "non-major" rule.

This final rule has been reviewed under Executive Order 12778, Civil Justice Reform. This action is not intended to have retroactive effect. This final rule will not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of the use of volume regulations on small entities as well as larger ones.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 130 handlers of California-Arizona navel oranges subject to regulation under the navel orange marketing order and approximately 4,000 navel orange producers in California and Arizona. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.601) as those having annual receipts of less than $500,000, and small agricultural service firms are defined as those whose annual receipts are less than $3,500,000. The majority of handlers and producers of California-Arizona navel oranges may be classified as small entities.

The California-Arizona navel orange industry is characterized by a large number of growers located over a wide area. The production area is divided into four districts which span Arizona and part of California. The largest proportion of navel orange production is located in District 1, Central California, which represented about 85 percent of the total production in 1991–92. District 2 is located in the southern coastal area of California and represented about 13 percent of 1991–92 production; District 3 is the desert area of California and Arizona, and it represented slightly less than 2 percent; and District 4, which represented less than 1 percent, is northern California.

The Committee adopted its marketing policy for the 1992–93 season on July 28, 1992. The Committee reviewed its marketing policy at district meetings as follows: Districts 1 and 4 on September 22, 1992, in Visalia, California; and Districts 2 and 3 on September 29, 1992, in Ontario, California. The Committee revised its crop estimate, utilization, and shipping schedule at its September 22 meeting and revised them again at its November 17 meeting. At its November 24 and December 1 meetings, and again at its December 8 meeting, the Committee adopted another revised shipping schedule. The marketing policy discussed, among other things, the potential use of volume regulations for the ensuing season. The marketing policy and the revised shipping schedule are available from the Committee or Mr. Nissen.

The Committee's revised estimate of 1992–93 production is 85,500 cars (one car equals 1,000 cartons at 37.5 pounds net weight each), as compared with 72,644 cars during the 1991–92 season. The Committee has estimated that about 61 percent of the 1992–93 crop of 85,500 cars will be utilized in fresh domestic channels (52,200 cars), with the remainder being exported fresh (12 percent), processed (25 percent), or designated for other uses (2 percent). This compares with the 1991–92 total of 44,875 cars shipped to fresh domestic markets, about 62 percent of that year's crop.

Based on the Committee's marketing policy, the crop and market information provided by the Committee, and other information available to the Department, the costs of implementing this regulation are expected to be more than offset by the potential benefits of regulation.

A proposed rule, based on the Committee's 1992–93 marketing policy, was published on October 23, 1992, in the **Federal Register** (57 FR 48340) inviting comments on the quantities of fresh California-Arizona navel oranges that may be shipped weekly to domestic markets for the 10-week period from the week ending November 5 through the week ending January 7, 1993. That rule provided interested persons the opportunity to comment on a proposed weekly volume regulation shipping level of 1,800,000 cartons for the week ending December 17.

Five comments have been received, one from Sequoia Orange Company, Inc. (Sequoia), one from Foothill Farms, two from Bee Sweet Citrus, Inc. (Bee Sweet), and one from the Small Business Administration's Office of Advocacy (SBA). The comments addressed all ten weeks of the proposed rule. The Sequoia and Foothill Farms comments were addressed in the final rule published on November 17, 1992, in the **Federal Register** (57 FR 54169), the initial comment by Bee Sweet was addressed in the final rule published in the **Federal Register** on November 23, 1992 (57 FR 54898), the comment by the SBA was addressed in the final rule published in the **Federal Register** on December 1, 1992, (57 FR 56803), and the second comment by Bee Sweet was addressed in the final rule published in the **Federal Register** on December 9, 1992 (57 FR 58125). The above comments in opposition to the proposed rule, as well as the alternatives presented, were previously denied. These comments warrant no further discussion. No additional comments were received.

The Committee met publicly on December 8, 1992, in Newhall, California, to consider the current and prospective conditions of supply and demand and recommended, with eight members voting in favor, two opposing, and one abstaining, that 1,900,000 cartons is the quantity of navel oranges deemed advisable to be shipped to fresh domestic markets during the specified week. The marketing information and data provided to the Committee and used in its deliberations was compiled by the Committee's staff or presented by Committee members at the meeting. This information included, but was not limited to, price data for the previous week from Department market news reports and other sources, preceding week's shipments and shipments to date, crop conditions and weather and transportation conditions.

The Department reviewed the Committee's recommendation in light of the Committee's projections as set forth in its 1992–93, marketing policy, and December 8 revised shipping schedule. The recommended amount of 1,900,000 cartons is 100,000 cartons above the amount specified in the proposed rule, and is consistent with the Committee's revised shipping schedule. Of the 1,000,000 cartons, 94.7 percent or 1,799,000 cartons are allotted for District 1, and 5.3 percent or 101,000 cartons are allotted for District 3. Handlers in Districts 2 and 4 will not be regulated as they are not shipping a sufficient quantity of navel oranges to warrant volume regulation at this time.

During the week ending on December 3, 1992, shipments of navel oranges to fresh domestic markets, including Canada, totaled 1,547,000 cartons, compared with 1,595,000 cartons shipped during the week ending on December 5, 1991. Export shipments totaled 154,000 cartons, compared with 183,000 cartons shipped during the week ending on December 5, 1991. Processing and other uses accounted for 391,000 cartons, compared with 263,000 cartons shipped during the week ending on December 5, 1991.

Fresh domestic shipments to date this season total 7,932,000 cartons, compared with 4,333,000 cartons shipped by this time last season. Export shipments total 540,000 cartons, compared with 682,000 cartons shipped by this time last season. Processing and other use shipments total 2,542,000 cartons, compared with 909,000 cartons shipped by this time last season.

For the week ending December 3, regulated shipments of navel oranges to the fresh domestic market were 1,509,000 cartons on an adjusted allotment of 1,453,000 cartons, which resulted in net overshipments of about 56,000 cartons. Regulated general maturity shipments for the current week (December 4 through December 10, 1992) are estimated at 1,800,000 cartons on an adjusted allotment of 1,671,000 cartons. Thus, overshipments of about 129,000 cartons could be carried forward into the week ending on December 17, 1992.

The average f.o.b. shipping point price for the week ending on December 3, 1992, was $7.42 per carton based on a reported sales volume of 1,099,000 cartons. The season average f.o.b. shipping point price for the week ending on December 5, 1991, was $9.85 per carton; the season average f.o.b. shipping point price at this time last year was $10.70.

The Department's Market News Service reported that, as of December 8, demand for California-Arizona navel oranges sizes 48–56 is "very good", and "good" for all other sizes. It was reported that many present shipments are for prior bookings. The market was reported as "about steady." It was also reported that harvesting has been curtailed in most areas on account of rain and wet fields.

At the meeting, Committee members discussed implementing volume regulation at this time, as well as different levels of allotment. Two members expressed concern about the quality of the oranges being shipped. A Committee staff member reported that rainfall has curtailed harvesting, however, the industry expects to harvest enough to meet current demand. Several members commented that the market has firmed, and demand has improved significantly. The majority of Committee members favored the issuance of general maturity allotment for Districts 1 and 3 at 1,900,000 cartons, while two

Committee members favored open movement at this time.

According to the National Agricultural Statistics Service, the 1991–92 season average fresh equivalent on-tree price for California-Arizona navel oranges was $5.29 per carton, 71 percent of the season average parity equivalent price of $7.43 per carton. Based upon fresh utilization levels indicated by the Committee and an econometric model developed by the Department, the 1992–93 season average fresh on-tree price is estimated at $3.49 per carton, about 45 percent of the estimated fresh on-tree parity equivalent price of $7.83 per carton.

Limiting the quantity of navel oranges that may be shipped during the period from December 11 through December 17, 1992, would be consistent with the provisions of the marketing order tending to establish and maintain, in the interest of producers and consumers, an orderly flow of navel oranges to market.

Based on considerations of supply and market conditions, and the evaluation of alternatives to the implementation of this volume regulation, the Administrator of the AMS has determined that this final rule will not have a significant economic impact on a substantial number of small entities and that this action will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is further found and determined that good cause exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register**. This is because there is insufficient time between the date of the final recommendation of the Committee based on the latest marketing information, and the effective date necessary to effectuate the declared policy of the Act.

This action needs to be effective for the regulatory week which begins on December 11, 1992. Interested persons were given the opportunity to comment on a proposed rule published on October 23, 1992, in the **Federal Register** (57 FR 48340). Further, interested persons were given an opportunity to submit information and views on the regulation prior to and at an open meeting, and handlers were apprised of its provisions and effective time. It is necessary, therefore, in order to effectuate the declared purposes of the Act, to make this regulatory provision effective as specified.

List of Subjects in 7 CFR Part 907

Marketing agreements, Oranges, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 907 is amended as follows:

PART 907—NAVEL ORANGES GROWN IN ARIZONA AND DESIGNATED PART OF CALIFORNIA

1. The authority citation for 7 CFR part 907 continues to read as follows:

Authority: Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674.

2. Section 907.1040 is added to read as follows:

Note: This section will not appear in the Code of Federal Regulations.

§ 907.1040 Navel Orange Regulation 740.

The quantity of navel oranges grown in California and Arizona which may be handled during the period from December 11 through December 17, 1992, is established as follows:

District 1	District 2	District 3	District 4	Total
cartons/ %	cartons/ %	cartons/ %	cartons/ %	cartons
(000) 1,799/94.7	(000) open	(000) 101/5.3	(000) open	(000) 1,900

Dated: December 9, 1992.

Robert C. Keeney,

Deputy Director, Fruit and Vegetable Division.

[FR Doc. 92–30444 Filed 12–11–92; 8:45 am]

BILLING CODE 3410–02–M

7 CFR Part 910

[Lemon Regulation 765]

Lemons Grown in California and Arizona; Limitation of Handling

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This regulation establishes the quantity of California-Arizona lemons that may be shipped to fresh domestic markets during the period from December 13 through December 19, 1992. Consistent with program objectives, such action is needed to balance the supplies of fresh lemons with the demand for such lemons during the period specified. This action was recommended by the Lemon Administrative Committee (Committee), which is responsible for local administration of the lemon marketing order.

EFFECTIVE DATE: Regulation 765 (7 CFR 910.1065) is effective for the period from December 13 through December 19, 1992.

FOR FURTHER INFORMATION CONTACT: Kenneth G. Johnson, Marketing Order Administration Branch, Fruit and Vegetable Division, Agricultural Marketing Service, U.S. Department of Agriculture, room 2523–S, P.O. Box 96456, Washington, DC 20090–6456; telephone: (202) 690–3670; or Martin Engeler, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Division, Agricultural Marketing Service, U.S. Department of Agriculture, 2202 Monterey Street, suite 102B, Fresno, California 93721; telephone: (209) 487–5901.

SUPPLEMENTARY INFORMATION: This final rule is issued under Marketing Order No. 910 (7 CFR part 910), as amended, regulating the handling of lemons grown in California and Arizona. This order is effective under the Agricultural Marketing Agreement Act of 1937, as amended, hereinafter referred to as the Act.

This final rule has been reviewed by the Department of Agriculture (Department) in accordance with Departmental Regulation 1512–1 and the criteria contained in Executive Order 12291 and has been determined to be a "non-major" rule.

This final rule has been reviewed under Executive Order 12778, Civil Justice Reform. This action is not intended to have retroactive effect. This final rule will not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and requesting a modification of the

order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after date of the entry of the ruling.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities as well as larger ones.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 70 handlers of lemons grown in California and Arizona subject to regulation under the lemon marketing order and approximately 2,000 lemon producers in the regulated area. Small agricultural producers have been defined by the Small Business Administration [13 CFR 121.601] as those having annual receipts of less than $500,000, and small agricultural service firms are defined as those whose annual receipts are less than $3,500,000. The majority of handlers and producers of California-Arizona lemons may be classified as small entities.

The Committee adopted its marketing policy for the 1992–93 season on May 5, 1992. The marketing policy discussed, among other things, the potential use of volume and size regulations for the ensuing season. This marketing policy is available from the Committee or Mr. Johnson.

Based on its revised crop estimate of 44,170 cars, the Committee estimates that about 40 percent of the 1992–93 crop will be utilized in fresh domestic channels (17,750 cars), compared with the 1991–92 total of approximately 17,000 cars. Fresh exports are projected at 16 percent of the total 1992–93 crop utilization, the same percentage for 1991–92. Processed and other uses would account for the residual 44 percent, again the same percentage for the 1991–92 crop.

Based on the Committee's marketing policy, the crop and market information provided by the Committee, and other information available to the Department, the costs of implementing this regulation are expected to be more than offset by the potential benefits of regulation.

A proposed rule, based on the Committee's 1992–93 marketing policy, was published October 29, 1992, in the **Federal Register** [57 FR 49023] inviting comments on the quantities of fresh California-Arizona lemons that may be shipped weekly to domestic markets for the 10-week period from the week ending November 14, 1992, through the week ending January 16, 1993. That rule provided interested persons the opportunity to comment on a proposed weekly volume regulation shipping level of 355,000 cartons for the week ending December 19, 1992.

Two comments were received, one from Associated Citrus Packers, Inc., and one from Sequoia Orange Company, Inc. The comments addressed all 10 weeks of the proposed rule. Both comments were addressed in the final rule published on November 23, 1992, in the **Federal Register** [57 FR 54900]. These comments warrant no further discussion. No additional comments were received.

The Committee met publicly on December 8, 1992, in Newhall, California, to consider the current and prospective conditions of supply and demand and, by a 10 to 2 vote, with 1 abstention, recommended that 325,000 cartons is the quantity of lemons deemed advisable to be shipped to fresh domestic markets during the specified week. This amount is below the level indicated in the proposed rule, and reflects inclement weather conditions affecting harvesting in the growing region and weakening market conditions. The marketing information and data provided to the Committee and used in its deliberations were compiled by the Committee's staff or presented by Committee members at the meeting. This information included, but was not limited to, price data for the previous week from Department market news reports and other sources, the preceding week's shipments and shipments to date, crop conditions, and weather and transportation conditions.

The Department reviewed the Committee's recommendation in light of the Committee's projections as set forth in its 1992–93 marketing policy. The recommended amount is below the amount specified in the proposed rule.

During the week ending on December 5, 1992, shipments of lemons to fresh domestic markets, including Canada, totaled 324,000 cartons compared with 299,000 cartons shipped during the week ending on December 7, 1991. Export shipments totaled 123,000 cartons compared with 120,000 cartons shipped during the week ending on December 7, 1991. Processing and other uses accounted for 535,000 cartons compared with 336,000 cartons shipped during the week ending on December 7, 1991. Regulated shipments for the current week (December 6, 1992, through December 12, 1992) are estimated at 360,000 cartons.

Fresh domestic shipments to date for the 1992–93 season total 5,992,000 cartons compared with 5,073,000 cartons shipped by this time during the 1991–92 season. Export shipments total 2,221,000 cartons compared with 2,214,000 cartons shipped by this time during 1991–92. Processing and other use shipments total 5,572,000 cartons compared with 2,966,000 cartons shipped by this time during 1991–92. The average f.o.b. shipping point price for the week ending on December 5, 1992, was $9.43 per carton based on a reported sales volume of 324,000 cartons compared with the previous week's average of $9.21 per carton on a reported sales volume of 248,000 cartons. The 1992–93 season average f.o.b. shipping point price to date is $11.94 per carton. The average f.o.b. shipping point price for the week ending on December 7, 1991, was $12.93 per carton; the season average f.o.b. shipping point price at this time during 1991–92 was $17.03 per carton.

The Department's Market News Service reported that, as of December 7, demand for lemons size 165 is very good, and for other lemon sizes the demand is "about unchanged".

At the meeting, Committee members discussed different levels of shipments, as well as crop and field conditions. The majority of Committee members stated that due to volume regulations being implemented in previous weeks, the lemon market has stabilized. Members supporting volume regulation cited the need for continued market stability and good returns to growers. Two Committee members supported a higher level of volume regulation to increase returns and one member abstained. Thus, the Committee, by a 10 to 2 vote, with 1 abstention, recommended volume regulation be established at 325,000 cartons for the week ending on December 19, 1992.

According to the National Agricultural Statistics Service, the season-to-date on-tree price for California-Arizona fresh lemons is $7.29 per carton, 72 percent of the season-to-date parity equivalent price. The season

average fresh on-tree price is projected at $9.12 per carton, 83 percent of the preliminary season average parity equivalent price of $10.96 per carton.

Limiting the quantity of lemons that may be shipped during the period from December 13 through December 19, 1992, would be consistent with the provisions of the marketing order by tending to establish and maintain, in the interest of producers and consumers, an orderly flow of lemons to market.

Based on considerations of supply and market conditions, and the evaluation of alternatives to the implementation of this volume regulation, the Administrator of the AMS has determined that this rule will not have a significant economic impact on a substantial number of small entities and that this action will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is further found and determined that good cause exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register.** This is because there is insufficient time between the date of the final recommendation of the Committee, based on the latest marketing information, and the effective date necessary to effectuate the declared policy of the Act.

This action needs to be effective for the regulatory week which begins on December 13, 1992. Interested persons were given the opportunity to comment on a proposed rule published on October 29, 1992, in the **Federal Register** [57 FR 49023]. Further, interested persons were given an opportunity to submit information and views on the regulation prior to and at an open meeting, and handlers were apprised of its provisions and effective time. It is necessary, therefore, in order to effectuate the declared purposes of the Act, to make this regulatory provision effective as specified.

List of Subjects in 7 CFR Part 910

Lemons, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 910 is amended as follows:

PART 910—LEMONS GROWN IN CALIFORNIA AND ARIZONA

1. The authority citation for 7 CFR part 910 continues to read as follows:

Authority: Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674.

2. Section 910.1065 is added to read as follows:

Note: This section will not appear in the Code of Federal Regulations.

§ 910.1065 Lemon Regulation 765.

The quantity of lemons grown in California and Arizona which may be handled during the period from December 13 through December 19, 1992, is established at 325,000 cartons.

Dated: December 9, 1992.

Robert C. Keeney,

Deputy Director, Fruit and Vegetable Division.

[FR Doc. 92–30445 Filed 12–11–92; 8:45 am]

BILLING CODE 3410–02–M

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 303

Waiver of Publication Requirements in Major Disaster Areas

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Statement and order; temporary exceptions.

SUMMARY: Section 5 of the Depository Institutions Disaster Relief Act of 1992 (DIDRA), signed by the President on October 23, 1992, authorizes the FDIC, during the 180-day period beginning on the date of enactment of the DIDRA, to make exceptions, with respect to institutions for which the FDIC is the primary federal regulator, to any publication requirement with respect to establishing branches or other deposit-taking facilities or any similar publication requirement. The exceptions are available for transactions or activities in major disaster areas declared by the President, or as to regulated institutions headquartered in such areas, when the exceptions would facilitate recovery from the disaster.

DATES: This order is effective on December 15, 1992, and expires April 21, 1993.

FOR FURTHER INFORMATION CONTACT: Robert F. Miailovich, Associate Director, Division of Supervision, (202) 898–6918, Curtis L. Vaughn, Examination Specialist, (202) 898–6759, or Joseph A. DiNuzzo, Senior Attorney, (202) 898–7349, Legal Division.

SUPPLEMENTARY INFORMATION:

Statement

Section 5 of DIDRA (Pub. L. 102–485, 106 Stat. 2773) authorizes the FDIC, during the period ending 180 days after October 23, 1992, to make exceptions to any publication requirement with respect to establishing branch or other deposit-taking facilities or any similar publication requirement to facilitate recovery in designated major disaster areas.

The FDIC has determined that recovery from Hurricanes Andrew and Iniki and from the Los Angeles civil unrest in May 1992 would be facilitated by exempting from publication requirements certain transactions involving establishing a branch or relocating a branch or main office in the areas directly affected by those disasters. Destruction of banking facilities in the affected areas interferes with the ability to deliver financial services. The order issued with this statement removes one regulatory impediment to the ability of depository institutions to deliver full financial services in such areas.

The FDIC has also determined that the benefit from the waiver of publication outweighs the disadvantages of not receiving public comment before the transaction is consummated. The waiver is not designed to allow an institution to leave an affected area, but is intended to facilitate the return of full financial services to such areas.

Order

In accordance with section 5 of DIDRA, it is hereby ordered that the publication requirements in § 303.6(f)(1)(ii) (A) and (B) of the FDIC's regulations (12 CFR 303.6(f)(1)(ii) (A) and (B)) be suspended for a period of 180 days beginning October 23, 1992 and ending April 21, 1993 with respect to applications filed by FDIC-insured state nonmember banks whose principal place of business is within, or with respect to transactions or activities within, an area designated eligible for federal assistance by the Federal Emergency Management Agency as a result of Hurricanes Andrew [1] or Iniki [2] or of the Los Angeles civil unrest in May 1992 [3];

Provided

The facilities involved were directly affected by the disaster; or

The facilities involved were not directly affected by the disaster but the

[1] Florida counties: Broward, Collier, Dade, Monroe.

Louisiana parishes: Acadia, Allen, Ascension, Assumption, Avoyelles, Calcasieu, Cameron, East Baton Rouge, East Feliciana, Evangeline, Iberia, Iberville, Jefferson, Jefferson Davis, Lafayette, Lafourche, Livingston, Orleans, Plaquemines, Pointe Coupee, Rapides, St. Bernard, St. Charles, St. Helena, St. James, St. John the Baptist, St. Landry, St. Martin, St. Mary, St. Tammany, Tangipahoa, Terrebonne, Vermilion, Washington, West Baton Rouge, West Feliciana.

[2] Hawaii counties: Hawaii, Kahoolawe, Kauai, Lanai, Maui, Molokai, Niihau, Oahu.

[3] California county: Los Angeles.

institution's records explain how the transaction would facilitate recovery from the disaster.

By Order of the Board of Directors.

Dated at Washington, DC, this 8th day of December, 1992.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Deputy Executive Secretary.

[FR Doc. 92-30421 Filed 12-14-92; 8:45 am]

BILLING CODE 6714-01-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 92-NM-223-AD; Amendment 39-8435; AD 92-27-02]

Airworthiness Directives; Boeing Model 747-400 and 767 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that is applicable to certain Boeing Model 747-400 and 767 series airplanes equipped with Rolls Royce engines. This action requires repetitive visual inspections of the power feeder connector at each engine firewall to detect signs of arcing, deterioration, unusual hardness or softness, and cracking of the elastomer insert; and the replacement of any damaged connectors found. This amendment is prompted by reports of damage to strut firewall power feeder connectors on these airplanes. The actions specified in this AD are intended to prevent undetected fires in the engine strut caused by ignition of fuel or fuel vapors near an overheated connector.

DATES: Effective December 30, 1992.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of December 30, 1992.

Comments for inclusion in the Rules Docket must be received on or before February 16, 1993.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM-103, Attention: Rules Docket No. 92-NM-223-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056.

The service information referenced in this AD may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124-2207. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Mr. Stephen S. Oshiro, Aerospace Engineer, Seattle Aircraft Certification Office, Systems and Equipment Branch, ANM-130S, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055-4056; telephone (206) 227-2793; fax (206) 227-1181.

SUPPLEMENTARY INFORMATION: The FAA has received several reports of damage to strut firewall power feeder connectors on Model 747-400 and 767 series airplanes equipped with Rolls Royce engines. Electrical power from the engine-driven generators was lost due to failures of the power feeder connectors at the engine firewalls. These connectors overheated and failed due to inadequate capacity of the connectors to carry current. The connectors are located in the flammable leakage zone of the engine strut. This condition, if not corrected, could result in undetected fires in the engine strut caused by ignition of fuel or fuel vapors near an overheated connector.

The FAA has reviewed and approved Boeing Alert Service Bulletins 747-24A2190 and 767-24A0088, both dated November 16, 1992, that describe procedures for repetitive visual inspections of the power feeder connector at each engine firewall to detect signs of arcing, deterioration, unusual hardness or softness, and cracking of the elastomer insert. It also describes procedures for the replacement of any damaged connectors found.

Since an unsafe condition has been identified that is likely to exist or develop on other Model 747-400 and 767 series airplanes of the same type design, this AD is being issued to prevent undetected fires in the engine strut caused by ignition of fuel or fuel vapors near an overheated connector. This AD requires repetitive visual inspections of the power feeder connector at each engine firewall to detect signs of arcing, deterioration, unusual hardness or softness, and cracking of the elastomer insert; and the replacement of any damaged connectors found. The actions are required to be accomplished in accordance with the service bulletins described previously.

This is considered to be interim action until final action is identified, at which time the FAA may consider further rulemaking.

Since a situation exists that requires the immediate adoption of this regulation, it is found that notice and opportunity for prior public comment hereon are impracticable, and that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

Although this action is in the form of a final rule that involves requirements affecting flight safety and, thus, was not preceded by notice and an opportunity for public comment, comments are invited on this rule. Interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified under the caption "ADDRESSES." All communications received on or before the closing date for comments will be considered, and this rule may be amended in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of the AD action and determining whether additional rulemaking action would be needed.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify the rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report that summarizes each FAA-public contact concerned with the substance of this AD will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 92-NM-223-AD." The postcard will be date stamped and returned to the commenter.

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

The FAA has determined that this regulation is an emergency regulation and that it is not considered to be major under Executive Order 12291. It is impracticable for the agency to follow the procedures of Order 12291 with respect to this rule since the rule must be issued immediately to correct an unsafe condition in aircraft. It has been determined further that this action involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979). If it is determined that this emergency regulation otherwise would be significant under DOT Regulatory Policies and Procedures, a final regulatory evaluation will be prepared and placed in the Rules Docket. A copy of it, if filed, may be obtained from the Rules Docket at the location provided under the caption "ADDRESSES."

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends 14 CFR part 39 of the Federal Aviation Regulations as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. App. 1354(a), 1421 and 1423; 49 U.S.C. 106(g); and 14 CFR 11.89.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

92-27-02. Boeing: Amendment 39-8435. Docket 92-NM-223-AD.

Applicability: Model 747-400 series airplanes having line positions up to and including 958, inclusive, equipped with Rolls Royce engines and electrical power feeder connectors at engine firewalls; and Model 767 series airplanes having variable numbers 111 through 124, inclusive, and variable numbers 120 through 132, inclusive, equipped with Rolls Royce engine and electrical power feeder connectors at engine firewalls; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent undetected fires in the engine strut, accomplish the following:

(a) Within 30 days after the effective date of this AD, perform a visual inspection of the power feeder connector at each engine firewall to detect signs of arcing, deterioration, unusual hardness or softness, and cracking of the elastomer insert, in accordance with Boeing Alert Service Bulletin 747-24A2190, dated November 16, 1992 (for Model 747-400 series airplanes); or Boeing Alert Service Bulletin 767-24A0088, dated November 16, 1992 (for Model 767 series airplanes); as applicable.

(1) If any damaged connector is found, prior to further flight, replace it in accordance with the applicable service bulletin. Prior to the accumulation of 1,200 flight hours on the new connector, perform the inspection required by paragraph (a) of this AD. Thereafter, repeat that inspection at intervals not to exceed 800 flight hours until the connector is replaced again.

(2) If no damage is found and no connector is replaced, repeat the inspection required by paragraph (a) of this AD at intervals not to exceed 800 flight hours.

(b) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Seattle ACO.

Note: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Seattle ACO.

(c) Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate the airplane to a location where the requirements of this AD can be accomplished.

(d) The inspections and replacement shall be done in accordance with Boeing Alert Service Bulletin 747-24A2190, dated November 16, 1992; or Boeing Alert Service Bulletin 767-24A0088, dated November 16, 1992; as applicable. This incorporation by reference was approved by the Director of the **Federal Register** in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124-2207. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the **Federal Register**, 800 North Capitol Street, NW., suite 700, Washington, DC.

(e) This amendment becomes effective on December 30, 1992.

Issued in Renton, Washington, on December 7, 1992.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 92-30350 Filed 12-14-92; 8:45 am]

BILLING CODE 4910-13-M

14 CFR Part 71

[Airspace Docket No. 92-AWP-14]

Establishment of Two Transition Areas in the Vicinity of the Goffs Very High Frequency Omnidirectional Range/ Tactical Air Navigation (VORTAC), CA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes two 7,000 foot MSL and above transition areas near the Goffs VORTAC, CA. These transition areas will provide controlled airspace for aircraft proceeding via a Standard Terminal Arrival Route (STAR) into the Las Vegas McCarran International Airport, NV.

EFFECTIVE DATE: 0901 UTC, February 4, 1993.

FOR FURTHER INFORMATION CONTACT: Gene Enstad, Airspace Specialist, System Management Branch, AWP-530, Air Traffic Division, Western-Pacific Region, Federal Aviation Administration, 15000 Aviation Boulevard, Lawndale, California 90261, telephone (310) 297-0010.

SUPPLEMENTARY INFORMATION:

History

On August 20, 1992, the FAA proposed to amend part 71 of the Federal Aviation Regulations (14 CFR part 71) to establish two 7,000 foot MSL and above transition areas near the Goffs VORTAC, CA (57 FR 40148). Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments were received. Transition areas are published in § 71.181 of FAA Order 7400.7A, dated November 2, 1992, and effective November 27, 1992, which is incorporated by reference in 14 CFR 71.1. The transition areas listed in this document will be published subsequently in the Order.

The Rule

This amendment to part 71 of the Federal Aviation Regulations establishes the Goffs North and Goffs South transition areas. The base of controlled airspace in these areas is lowered from the base of the Continental Control Area to 7,000 feet MSL. The first of the two transition areas (Goffs North) is bounded by the southeast edge of Victor Airway 8 (V-8) on the northwest, the western edge of V-237 on the east, and the northern edge of V-210 on the south. The second transition area (Goffs South) is bounded by the southern edge of V-210 on the north, the western edge

of V–237 on the east and the northeast edge of V–135 on the southwest. The Minimum Vectoring Altitude (MVA) is 7,000 feet MSL in that area. These transition areas will provide controlled airspace for aircraft proceeding via a Standard Terminal Arrival Route (STAR) into the Las Vegas McCarran Airport from the vicinity of the Thermal VORTAC, CA.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Aviation safety, Incorporated by reference, Transition areas.

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF FEDERAL AIRWAYS, AREA LOW ROUTES, CONTROLLED AIRSPACE, AND REPORTING POINTS, JET ROUTES, AND AREA HIGH ROUTES

1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. app. 1348(a), 1354(a), 1510; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389; 49 U.S.C. 106(g); 14 CFR 11.69

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.7A, Compilation of Regulations, dated November 2, 1992, and effective November 27, 1992, is amended as follows:

Section 71.181 Designation of Transition Areas

* * * * *

AWP CA TA Goffs North [New]

That airspace extending upward from 7,000 feet MSL and above bounded by the southeast edge of Victor Airway 8 (V–8) on the northwest, the western edge of V–237 on the east, and the northern edge of V–210 on the south.

AWP CA TA Goffs South [New]

That airspace extending upward from 7,000 feet MSL and above bounded by the south edge of V–210 on the north, the western edge of V–237 on the east, and the northeastern edge of V–135 on the southwest.

* * * * *

Issued in Los Angeles, California, on November 19, 1992.

Richard R. Lien,

Manager, Air Traffic Division. Western-Pacific Region.

[FR Doc. 92–30409 Filed 12–14–92; 8:45 am]

BILLING CODE 4910–13–M

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14 CFR Part 71

[Airspace Docket No. 92–ACE–02]

Designation of Control Zone; Hays, Kansas

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action designates a control zone at Hays, Kansas, to provide additional controlled airspace for aircraft using the Hays, Kansas, Municipal Airport.

EFFECTIVE DATE: 0901 UTC, February 4, 1993.

FOR FURTHER INFORMATION CONTACT: Dale Carnine, Airspace Specialist, System Management Branch, Air Traffic Division, ACE–530, FAA, Central Region, 601 East 12th Street, Kansas City, Missouri 64106, Telephone (816) 426–3408.

SUPPLEMENTARY INFORMATION:

History

On May 29, 1992, the FAA published a notice of proposed rulemaking that proposed to amend part 71 of the Federal Aviation Regulations to designate a control zone at Hays, Kansas (57 FR 22672). Interested persons were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No objections were received as a result of the notice of proposed rulemaking. Except for editorial changes, this amendment is the same as that proposed in the notice.

The coordinates in the proposal were published in North American Datum 27. However, these coordinates have been updated to North American Datum 83 for this final rule. Control zones are published in § 71.171 of FAA Order 7400.7A dated November 2, 1992, and effective November 27, 1992, which is incorporated by reference in 14 CFR 71.1. The control zone listed in this document will be published subsequently in the Order.

The Rule

This amendment to part 71 of the Federal Aviation Regulations designates a control zone at Hays, Kansas. To enhance airport usage, an Automated Weather Observation System (AWOS) has been installed that will provide weather data on a 24 hour basis. Accordingly, the control zone for the Hays Municipal Airport, Hays, Kansas, which was canceled effective June 28, 1990, is being reactivated. The intended effect of this action is to provide segregation of aircraft operating under Instrument Flight Rules (IFR) from other aircraft operating in visual meteorological conditions. The notice of proposed rulemaking was published using statute miles in the legal description. The legal description for this final rule is being published in nautical miles in accordance with the Airspace Reclassification program.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Aviation safety, Control zones, Incorporation by reference.

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—[AMENDED]

1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. app. 1348(a), 1354(a), 1510; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389; 49 U.S.C. 106(g); 14 CFR 11.69.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.7A,

Compilation of Regulations, dated November 2, 1992, and effective November 27, 1992, is amended as follows:

Section 71.171 Designation of Control Zones

* * * * *

ACE KS CZ Hays, Kansas

Hays Municipal Airport, Kansas [New] (lat. 38°50'44" N, long. 99°16'27" W)
Hays VORTAC (lat. 38°50'52" N, long. 99°16'36" W)

That airspace extending upward from the surface to and including 3,200 feet MSL within a 4.1-nautical mile radius of Hays Municipal Airport and within 1.8 nautical miles each side of the Hays VORTAC 005° radial extending from the 4.1-nautical mile radius to 6.0 nautical miles north of the VORTAC and within 1.8 nautical miles each side of the Hays VORTAC 169° radial extending from the 4.1-nautical mile radius to 6.0 nautical miles south of the VORTAC.

* * * * *

Issued in Kansas City, Missouri, on December 1, 1992.

R. Harry Hale, Jr.,

Acting Manager, Air Traffic Division, Central Region.

[FR Doc. 92-30411 Filed 12-14-92; 8:45 am]
BILLING CODE 4910-13-M

DEPARTMENT OF COMMERCE

Bureau of Economic Analysis

15 CFR Part 801

[Docket No. 920786-2289]

RIN 0691-AA19

International Services Surveys: BE-22, Annual Survey of Selected Services Transactions With Unaffiliated Foreign Persons

AGENCY: Bureau of Economic Analysis, Commerce.

ACTION: Final rule.

SUMMARY: This final rule amends 15 CFR 801.9 by revising the reporting requirements for the BE-22, Annual Survey of Selected Services Transactions With Unaffiliated Foreign Persons.

The BE-22 survey is conducted by the Bureau of Economic Analysis (BEA), U.S. Department of Commerce, under the International Investment and Trade in Services Survey Act. It is the annual follow-on survey to the quinquennial BE-20, Benchmark Survey of Selected Services Transactions With Unaffiliated Foreign Persons, which was last conducted for 1991. Together, the two surveys produce a continuous annual time series of data on major types of services that are out of scope of other international services surveys. Reporting on the revised BE-22 will begin with the survey covering 1992; forms are scheduled to be mailed out in December 1992, and completed forms will be due to BEA on March 31, 1993.

The data from the BE-22 survey, together with the data from the BE-20 benchmark survey, are used to formulate U.S. international trade policy on services, support bilateral and multilateral trade negotiations, compile the U.S. balance of payments and the national income and product accounts, develop U.S. international price indexes for services, assess U.S. competitiveness in international trade in services, and improve the ability of U.S. businesses to identify and evaluate market opportunities.

EFFECTIVE DATE: These rules will be effective January 14, 1993.

FOR FURTHER INFORMATION CONTACT: Betty L. Barker, Chief, International Investment Division (BE-50), Bureau of Economic Analysis, U.S. Department of Commerce, Washington, DC 20230; phone (202) 523-0659.

SUPPLEMENTARY INFORMATION: In the August 26, 1992 **Federal Register**, volume 57, no. 166 (57 FR 38635), BEA published a notice of proposed rulemaking setting forth reporting requirements for the BE-22, Annual Survey of Selected Services Transactions With Unaffiliated Foreign Persons. No comments on the proposed rule were received. As a result, the final rule is the same as the proposed rule.

Three major changes to the BE-22 survey since it was last conducted for 1990 are set forth in this final rule:

(1) The exemption criteria for the survey are changed from a per-transaction to a total transactions basis, as was done for the 1991 BE-20 benchmark survey. Specifically, a U.S. person is required to report sales of a given service if total sales of that service exceed $1 million, and is required to report purchases of the service if total purchases of that service exceed $1 million. (The reporting threshold for the 1991 BE-20 survey was $500,000 of total sales or purchases of the given service.)

(2) Coverage of several small types of services—agricultural services; management of health care facilities; mailing, reproduction, and commercial art; and temporary help supply services—is eliminated. During the review and OMB clearance of the 1991 BE-20 benchmark survey, BEA agreed to drop these types of services from the BE-22 as long as results of the 1991 and subsequent BE-20 surveys show that transactions in them continued to be small. (Accounting services were also considered for elimination, but, because they were relatively large in both 1990 and 1991, and because data users favored their continued inclusion, the proposed and final rules reflect continued coverage.)

(3) Four services not previously included on the survey are now included. Three of these services—losses recovered on purchases of primary insurance; receipts and payments for the purchase, sale, or use of rights to natural resources; and certain "miscellaneous" disbursements, consisting of outlays to fund news-gathering costs of broadcasters and the print media, production costs of motion picture companies and companies engaged in the production of broadcast material other than news, and costs of maintaining tourist, business promotion, sales or representative offices, and for participation in foreign trade shows—were covered for the first time in the 1991 BE-20. In addition, purchases of certain financial services from foreigners will be covered in the BE-22 survey for the first time. These financial services mainly consist of those for which an explicit fee is paid and that are purchased directly by U.S. firms that are not financial services intermediaries or providers.

BEA also has made a minor change in the reporting of lease bonus payments. These transactions must be reported with purchases and sales of rights to natural resources, to conform to the treatment in the U.S. national income and product accounts. Previously, these payments were reported with receipts and payments for the use of rights to natural resources.

The public reporting burden for this collection of information is estimated to vary from 4 to 500 hours per response, with an average of 11.5 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Comments regarding the burden estimate, including suggestions for reducing this burden, may be sent to Director, Bureau of Economic Analysis (BE-1), U.S. Department of Commerce, Washington, DC 20230; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Paperwork Reduction Project 0608-0060, Washington, DC 20503.

Executive Order 12291

BEA has determined that this final rule is not "major" as defined in

Executive Order 12291 because it is not likely to result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Executive Order 12612

This final rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612.

Paperwork Reduction Act

The collection of information requirement in this final rule has been approved by OMB (OMB No. 0608–0060).

Regulatory Flexibility Act

The General Counsel, Department of Commerce, has certified to the Chief Counsel for Advocacy, Small Business Administration, under provisions of the Regulatory Flexibility Act (5 U.S.C. 605(b)), that this final rule will not have a significant economic impact on a substantial number of small entities. The exemption level for the survey excludes most small businesses from mandatory reporting. Reporting is required only if total sales or total purchases of a given type of service with unaffiliated foreign persons exceed $1,000,000 during the year. In addition, international business, whether in goods or services, tends to be conducted mainly by the larger companies in a given industry. Finally, small businesses tend to have specialized operations and activities, so those that do have reportable transactions will likely have to report only one type of service; therefore, the burden on them should be relatively small.

List of Subjects in 15 CFR Part 801

Economic statistics, Balance of payments, Foreign trade, Reporting and recordkeeping requirements.

Dated: October 30, 1992.

Carol S. Carson,

Director, Bureau of Economic Analysis.

For the reasons set forth in the preamble, BEA amends 15 CFR part 801 as follows:

PART 801—[AMENDED]

1. The authority citation for 15 CFR part 801 continues to read as follows:

Authority: 5 U.S.C. 301, 22 U.S.C. 3101–3108, and E.O. 11961, as amended.

2. Section 801.9(b)(6) is revised to read as follows:

§ 801.9 Reports required.

* * * * *

(b) * * *

(6) BE–22, Annual Survey of Selected Services Transactions With Unaffiliated Foreign Persons:

(i) *Who must report*—(A) *Mandatory reporting.* A BE–22 report is *required* from each U.S. person who had transactions (either sales or purchases) in excess of $1,000,000 with unaffiliated foreign persons in any of the covered services during the U.S. person's fiscal year. The determination of whether a U.S. person is subject to this mandatory reporting requirement may be judgmental, that is, based on the judgment of knowledgeable persons in a company who can identify reportable transactions on a recall basis, with a reasonable degree of certainty without conducting a detailed manual records search.

(B) *Voluntary reporting.* If, during the U.S. person's fiscal year, the U.S. person's total transactions (either sales or purchases) in any of the covered services is $1,000,000 or less, the U.S. person is requested to provide an estimate of the total for each type of service. Provision of this information is voluntary. The estimates may be judgmental, that is, based on recall, without conducting a detailed manual records search.

(C) Any U.S. person receiving a BE–22 survey form from BEA must complete all relevant parts of the form and return the form to BEA. A person that is not subject to the mandatory reporting requirement in paragraph (b)(6)(i)(A) of this section and is not filing information on a voluntary basis must only complete the "Determination of reporting status" and the "Certification" sections of the survey. This requirement is necessary to ensure compliance with the reporting requirements and efficient administration of the survey by eliminating unnecessary followup contact.

(ii) *Covered services.* With the exceptions given below, the services covered by this survey are the same as those covered by the BE–20, Benchmark Survey of Selected Services Transactions With Unaffiliated Foreign Persons—1991, as listed in § 801.10(c) of this part. The exceptions are the elimination of coverage of four small types of services—agricultural services; management of health care facilities; mailing, reproduction, and commercial art; and temporary help supply services—and the addition of coverage of purchases of certain financial services. The financial services covered are those directly purchased from or sold to foreigners by U.S. companies (or by domestic subsidiaries of consolidated U.S. companies) that are not financial services intermediaries or providers. Finally, lease bonus payments are to be reported with purchases or sales of rights to natural resources, rather than with receipts or payments for the use of rights to natural resources.

* * * * *

[FR Doc. 92–30233 Filed 12–14–92; 8:45 am]

BILLING CODE 3510–06–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 2, 35, 50, 131, 141, 292, 300 and 385

[Docket No. RM92–6–001]

Eliminating Unnecessary Regulation; Order No. 541–A

December 9, 1992.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule; order denying rehearing.

SUMMARY: This order denies a request for rehearing of that portion of a final rule deleting the provision of the Commission's regulations which provided that a Federal Power Marketing Administration must include a chronological discussion of the procedural history of the rate filing, including meetings held with the general public, in the record that it files with the Commission. This order states that, under the current delegation of authority from the Department of Energy, the Commission has no authority to review the procedures by which the Western Area Power Administration develops the record that it submits to the Commission.

EFFECTIVE DATE: December 9, 1992.

FOR FURTHER INFORMATION CONTACT: Joseph C. Lynch, Federal Energy Regulatory Commission, Office of the General Counsel, 825 North Capitol Street, NE., Washington, DC 20426, (202) 208–2128.

SUPPLEMENTARY INFORMATION: In addition to publishing the full text of

this document in the Federal Register, the Commission also provides all interested persons an opportunity to inspect or copy the contents of this document during normal business hours in room 3308, 941 North Capitol Street, NE, Washington, DC 20426. The Commission Issuance Posting System (CIPS), an electronic bulletin board service, provides access to the texts of formal documents issued by the Commission. CIPS is available at no charge to the user and may be accessed using a personal computer with a modem by dialing (202) 208–1397. To access CIPS, set your communications software to use 300, 1200 or 2400 baud, full duplex, no parity, 8 data bits and 1 stop bit. The full text of Order No. 541–A will be available on CIPS for 10 days from the date of issuance. The complete text on diskette in WordPerfect format may also be purchased from the Commission's copy contractor, La Dorn Systems Corporation, also located in room 3308, 941 North Capitol Street, NE., Washington, DC 20426.

Order Denying Rehearing

Deletions of Certain Outdated or Nonessential Regulations Pertaining to the Commission's Jurisdiction Under Parts II and III of the Federal Power Act, the Public Utility Regulatory Policies Act of 1978, the Pacific Northwest Electric Power Planning and Conservation Act and Delegations from the Secretary of Energy.

Background

On June 1, 1992, the Colorado River Energy Distributors Association (CREDA),[1] filed a request for rehearing of Order No. 541.[2]

In Order No. 541, the Commission, *inter alia*, deleted 18 CFR 300.10(f)(2)(i), which provided that a Federal Power Marketing Administration (PMA)[3] must include a chronological discussion of the procedural history of the rate filing, including meetings held with the general public, in the record that it files with the Commission.

CREDA argues that, by no longer requiring that PMAs include a chronological discussion of the procedural history of the filing under review, the Commission has contravened the standards governing Commission review of PMA ratemaking. According to CREDA, until Order No. 541, the Commission has always viewed itself as an appellate court to PMA ratemaking, deciding whether proposed PMA rates have a rational basis and are consistent with statutory requirements. CREDA argues that elimination of the regulation requiring a PMA to submit the procedural history of rate development effectively precludes the Commission from acting in its appellate capacity to determine whether the PMA has met the requirements of due process. CREDA sees the elimination of the previously-required procedural history as a radical departure from past Commission practice.

CREDA also challenges the Commission's citation in Order No. 541 of *Aluminum Company of America* v. *Bonneville Power Administration*, 903 F.2d 585 (9th Cir. 1989), *cert. denied*. _____U.S. _____, 111 S.Ct. 672 (1991) (*Alcoa*). CREDA argues that *Alcoa* involved only Bonneville and that the Commission reviews Western's rates under different authority.

CREDA also argues that, by deleting section 300.10(f)(2)(i) in an immediately-effective final rule, the Commission denied CREDA notice and an opportunity to comment, in violation of section 553 of the Administrative Procedure Act (APA), 5 U.S.C. 553 (1988). CREDA contends that the Commission's deletion of section 300.10(f)(2)(i) in a final rule, with no opportunity for comment, was arbitrary and capricious.

CREDA insists that the Commission must reverse its deletion of the requirement for filing a procedural history. Alternatively, CREDA also requests that the Commission stay the effective date of Order No. 541 and subject the deletion of the regulation in question to notice and comment.[4]

Discussion

CREDA argues that the Commission's elimination of the routine filing of the procedural history of a PMA's rate development represents an unlawful limitation on the scope of Commission review of a PMA's, and, in particular, Western's, rates. CREDA is mistaken.

The Department of Energy Organization Act provides the Secretary of Energy with the authority to approve Western's rates on both an interim and on a final basis.[5] The Secretary has delegated to the Assistant Secretary, Conservation and Renewable Energy, Department of Energy (DOE), the authority to confirm and approve Western's rates on an interim basis, and has delegated to the Commission the authority to confirm and approve Western's rates on a final basis.[6]

That delegation of authority strictly limits the Commission's scope of review. The Commission's review is "limited to":

(a) Whether the rates are the lowest possible to customers consistent with sound business principles;

(b) Whether the revenue levels generated by the rates are sufficient to recover the costs of producing and transmitting electric energy including the repayment, within the period of cost recovery permitted by law, of the capital investment allocated to power and costs assigned by Acts of Congress to power for repayment; and

(c) The assumptions and projections used in developing the rate components that are subject to Commission review.[7]

The Commission's policy in reviewing Western's rates under the delegation of authority, as CREDA notes, has been to perform the function of an

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[1] CREDA's members consist of 133 electric systems serving customers in the States of Arizona, Colorado, Nevada, New Mexico, Utah and Wyoming, and purchase approximately 85 percent of the power and energy of the Salt Lake City Integrated Projects, which is marketed by the Western Area Power Administration (Western). Many of the members also purchase power and energy from other projects such as Parker-Davis, Boulder Canyon, and Pick-Sloan, whose power and energy is marketed by Western.

[2] Deletions of Certain Outdated or Nonessential Regulations, *et al.*, 57 FR 21730 (May 22, 1992), III FERC Stats. & Regs. ¶ 30,943 (1992).

[3] The PMAs include the Alaska, Southeastern and Southwestern Power Marketing Administrations, as well as Western.

The Bonneville Power Administration (Bonneville) is also a PMA, but its rate filings are also governed by additional Commission regulations. Compare 18 CFR 300.1(a) (making requirements applicable to all PMA's including Bonneville) with 18 CFR 300.10(a)(3)(ii), .10(b)(1), .10(c)(5), .14, .20, .21 (specifying additional requirements applicable only to Bonneville's rate filings).

[4] The request for a stay is premised on the need for notice and comment. As described below, however, there was and is no such need. Accordingly, the request for a stay will be denied.

[5] See 42 U.S.C. 7152 (1988).

[6] See DOE Delegation Order No. 0204–108, 48 FR 55664 (1983), amended, 51 FR 19744 (1986), further amended, 56 FR 41835 (1991). This delegation of authority also grants the Commission authority to review the rates of the Alaska, Southeastern and Southwestern Power Marketing Administrations. The Commission is here focusing on Western's ratemaking because that is the gravamen of CREDA's concern. However, what is stated as to the Commission's review of Western's ratemaking is also true of the Commission's review of Western's ratemaking is also true of the Commission's review of the other PMAs' ratemaking.

[7] 56 FR at 41836. The delegation of authority further provides that, with certain exceptions not here applicable, the Commission:

shall reject [Western's] decisions * * * *only* if the Commission finds them to be arbitrary, capricious, or in violation of the law.

Id. (emphasis added). While CREDA implies that this language provides a separate and independent basis for review of Western's rates, CREDA Request for Rehearing at 9–10, that is not the case. While the Commission is authorized to reject rates that are "arbitrary, capricious, or in violation of the law," the scope of the Commission's review is expressly constrained to the three matters identified in the text above. If the proposed rates are not, for example, the lowest possible to customers consistent with sound business principles, the rates can be rejected.

appellate tribunal.[8] But the delegation of authority limits the Commission's review of Western's rates. The delegation of authority does not provide for Commission review of Western's procedures. Accordingly, given that the Commission cannot exceed the scope of the authority delegated to it, the Commission cannot review the procedures by which Western develops its record.[9]

CREDA cites to *United States* v. *City of Fulton*, 475 U.S. 657, 663 (1986), which, in turn, cites to earlier Commission language stating that the Commission's review function in confirmation and approval cases is to determine from the record before it "that due process requirements have been met and that the Administrator's program of rate schedules and the decision of the [Assistant Secretary] are rational and consistent with the statutory standards."[10]

The Commission notes that when the Commission issued its earlier order containing the language just quoted, its review authority was prescribed by a different delegation order than the current delegation order. The earlier delegation order contained none of the limiting language that the current delegation order contains.[11] As noted above, the current delegation order limits the Commission's review of Western's rates to the criteria listed above. Accordingly, even if the Commission had in the past, under a previous delegation of authority, viewed its role as overseeing Western's hearing requirements, it can no longer do so. The deletion of the regulation in question is thus merely a recognition of the Commission's current, limited review authority.

CREDA also notes that section 553 of the APA, section 501 of the DOE Organization Act, and DOE's regulations require Western to provide notice and opportunity to comment on a proposed rate to ensure public participation in the rate's development. This is true, but irrelevant to our inquiry here. The Commission is not the proper forum in which to enforce either APA or DOE procedural requirements for Western's ratemaking, because, as explained above, the delegation of authority precludes the Commission from considering whether Western has complied with such procedural requirements. The Commission can only determine whether the rates that Western proposes, and the Assistant Secretary confirms on an interim basis, satisfy the criteria for final Commission approval expressly provided in the delegation of authority.[12]

The Commission can probe the assumptions and projections that Western uses in developing the rate components that are subject to Commission review. But the delegation of authority does not authorize the Commission to examine the procedures by which Western developed the record upon which it bases those assumptions and projections.

CREDA also faults the Commission for citing *Alcoa* in support of the removal of the regulation in question. CREDA points out that *Alcoa* involved Bonneville and not Western, and that the Commission reviews the proposed rates of the two PMAs under different authorities.[13] Upon further consideration, we agree with CREDA that *Alcoa* does not apply. But, as we explain above, the Commission's current delegation authority is sufficiently limited that the Commission cannot review Western's procedures.

CREDA next argues that the Commission should have provided notice and an opportunity for comment before deleting the requirement that a PMA must include a procedural history with the record that it files with the Commission. We disagree. CREDA bases its argument on its assertion that "Order No. 541 sharply deviates from existing policy and substantially impacts interested parties."[14] But CREDA is mistaken in its assertion that in Order No. 541 the Commission changed its policy. Far from deviating from existing policy, the deletion of the regulation in question was merely a comparatively minor procedural change implementing existing policy. The Commission has repeatedly observed that it does not review the procedures that a PMA such as Western uses to develop the record that it files with the Commission.[15] The removal of the regulation in question was thus neither "a radical change in [the Commission's] review policy of PMA rates[,]"[16] nor "a significant change in longstanding Commission policy[,]"[17] as CREDA charges. And the Commission has not "suddenly lost the authority to review the procedural history of PMA rate development,"[18] as CREDA surmises. Rather, as discussed above, the Commission does not have the authority to review the procedural history of PMA ratemaking, and does not do so.

Moreover, notice and an opportunity for comments are not required under the APA when an agency for good cause finds that notice and an opportunity for comments are impracticable, unnecessary, or contrary to the public

[8] CREDA Request for Rehearing at 9. See, e.g., United States Department of Energy—Western Area Power Administration (Salt Lake City Area Integrated Projects), 60 FERC ¶ 61,002 at 61,010 (1992) ("The Commission's policy in reviewing PMA rates under the * * * [delegation of authority] has been to perform the function of an appellate tribunal.").

[9] CREDA suggests that the delegation order provides for Commission review of Western's procedures: "[T]here are numerous procedural due process requirements in PMA rate development which, according to the Delegation Order * * *, the Commission must ensure that the PMA has followed prior to approving its rate." CREDA Request for Rehearing at 11. Although CREDA cites to no particular language that expressly provides for such review—because there is none—CREDA's subsequent discussion (referencing section 553 of the APA, *infra*, section 501(b) of the DOE Organization Act, 42 U.S.C. 7191(b) (1988), and DOE's regulations, 10 CFR 903 indicates that CREDA is relying on language in the delegation order that states:

> The Commission may reject decisions that are not in accord with (a) the standards set forth in DOE Order No. RA6120.2, or any revisions or modifications to such standards, adopted pursuant to the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and the Department of Energy Organization Act (42 U.S.C. 7191); and (b) the standards set forth in any interagency agreement between the Administrator and the power generating agency that is applicable.

56 FR at 41836. However, this language on its face does not provide for Commission review of Western's procedures in developing proposed rates. Rather, the language refers to the standards in DOE Order No. RA6120.2 and to revisions or modifications to such standards adopted pursuant to the APA and the DOE Organization Act. We add that the standards in DOE Order No. RA6120.2, referred to in the delegation order, are accounting, financial reporting, and ratemaking standards applicable to the PMAs.

[10] CREDA Request for Rehearing at 10–11 (citing City of Fulton, *supra*, in turn citing U.S. Secretary of Energy, Bonneville Power Administration, 13 FERC ¶ 61 157 at 61,339 (1981)

[11] Compare DOE Delegation Order No. 0204–33, 43 FR 60636 (1978) (published at I FERC Stats. & Regs. ¶ 9907) and 13 FERC at 61,337 with *supra* notes 6–7 and accompanying text. Indeed, the current delegation order was not issued until 1983, while the Commission order referred to by the Supreme Court and thus ultimately relied on by CREDA was issued in 1980.

[12] See *supra* note 7 and accompanying text. CREDA states that deletion of the regulation in question "irrevocably deprives CREDA of its right to review of * * * [procedural] issues under the * * * [delegation of authority]." CREDA Request for Rehearing at 19. The delegation of authority gives the Commission no right to review Western's procedures. However, if Western does not conform to the APA or to DOE's procedural requirements, CREDA would be free to seek review of Western's actions in an appropriate judicial forum.

[13] The Commission reviews Bonneville's proposed rates under the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. 839, *et seq.* (1988). The Commission reviews Western's proposed rates under DOE Delegation Order No. 0204–108, *supra* note 6.

[14] CREDA Request for Rehearing and at 19; see also id. at 13 ("[Order No. 541] deviates sharply from the Commission's longstanding conception of its review obligations under the * * * [delegation of authority]").

[15] See, e.g., 60 FERC at 61,009–10 & n.16.

[16] CREDA Request for Rehearing at 16.

[17] *Id.* at 18.

[18] *Id.* at 16.

interest.[19] The rule in question, providing for the filing of a procedural history, goes to matters beyond the scope of the Commission's review authority under the current delegation order, and, therefore, there was no necessity for notice and an opportunity for comments under the APA.[20]

The Commission orders:

(A) CREDA's request for rehearing is hereby denied.

(B) CREDA's request that the Commission stay the effectiveness of Order No. 541 and provide for notice and an opportunity for comments is hereby denied.

By the Commission.

Lois D. Cashell,

Secretary.

[FR Doc. 92–30332 Filed 12–14–92; 8:45 am]

BILLING CODE 6717–01–M

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 2619

Valuation of Plan Benefits in Single-Employer Plans; Amendment Adopting Additional PBGC Rates

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: This amendment to the regulation on Valuation of Plan Benefits in Single-Employer Plans contains the interest rates and factors for the period beginning January 1, 1993. The use of these interest rates and factors to value benefits is mandatory for some terminating single-employer plans and optional for others. The Pension Benefit Guaranty Corporation adjusts the interest rates and factors periodically to reflect changes in financial and annuity markets. This amendment adopts the rates and factors applicable to plans that terminate on or after January 1, 1993, which will remain in effect until the PBGC issues new interest rates and factors.

EFFECTIVE DATE: January 1, 1993.

FOR FURTHER INFORMATION CONTACT: Harold J. Ashner, Assistant General Counsel, Office of the General Counsel, Code 22500, Pension Benefit Guaranty Corporation, 2020 K Street, NW., Washington DC 20006, 202–778–8850 (202–778–8859 for TTY and TDD only). These are not toll-free numbers.

SUPPLEMENTARY INFORMATION: The Pension Benefit Guaranty Corporation's ("PBGC's") regulation on Valuation of Plan Benefits in Single-Employer Plans (29 CFR part 2619) sets forth the methods for valuing plan benefits of terminating single-employer plans covered under Title IV of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). Under ERISA section 4041(c), all plans wishing to terminate in a distress termination must value guaranteed benefits and "benefit liabilities", i.e., all benefits provided under the plan as of the plan termination date, using the formulas set forth in part 2619, subpart C. (Plans terminating in a standard termination may, for purposes of the Standard Termination Notice filed with PBGC, use these formulas to value benefit liabilities, although this is not required.) In addition, when the PBGC terminates an underfunded plan involuntarily pursuant to ERISA section 4042(a), it uses the subpart C formulas to determine the amount of the plan's underfunding.

Appendix B in part 2619 sets forth the interest rates and factors that are to be used in the formulas contained in the regulation. Because these rates and factors are intended to reflect current conditions in the financial and annuity markets, it is necessary to update the rates and factors periodically.

The rates and factors currently in use have been in effect since December 1, 1992. This amendment adds to Appendix B a new set of interest rates and factors for valuing benefits in plans that terminate on or after January 1, 1993, which set reflects a decrease of ¼ percent in the immediate interest rate from 6 percent to 5¾ percent.

Generally, the interest rates and factors will be in effect for at least one month. However, any published rates and factors will remain in effect until such time as the PBGC publishes another amendment changing them. Any change in the rates normally will be published in the **Federal Register** by the 15th of the month preceding the effective date of the new rates or as close to that date as circumstances permit.

The PBGC has determined that notice and public comment on this amendment are impracticable and contrary to the public interest. This finding is based on the need to determine and issue new interest rates and factors promptly so that the rates can reflect, as accurately as possible, current market conditions.

Because of the need to provide immediate guidance for the valuation of benefits in plans that will terminate on or after January 1, 1993, and because no adjustment by ongoing plans is required by this amendment, the PBGC finds that good cause exists for making the rates set forth in this amendment effective less than 30 days after publication.

The PBGC has determined that this is not a "major rule" under the criteria set forth in Executive Order 12291, because it will not result in an annual effect on the economy of $100 million or more, a major increase in costs for consumers or individual industries, or significant adverse effects on competition, employment, investment, productivity, or innovation.

List of Subjects in 29 CFR Part 2619

Employee benefit plans, Pension insurance, and Pensions.

In consideration of the foregoing, part 2619 of chapter XXVI, title 29, Code of Federal Regulations, is hereby amended as follows:

PART 2619 [AMENDED]

1. The authority citation for part 2619 continues to read as follows:

Authority: 29 U.S.C. 1301(a), 1302(b)(3), 1341, 1344, and 1362 (1988).

2. Rate Set 101 of Appendix B is revised and Rate Set 102 of Appendix B is added to read as follows. The introductory text is republished for the convenience of the reader and remains unchanged.

APPENDIX B—INTEREST RATES AND QUANTITIES USED TO VALUE IMMEDIATE AND DEFERRED ANNUITIES

In the table that follows, the immediate annuity rate is used to value immediate annuities, to compute the quantity "Gy" for deferred annuities and to value both portions of a refund annuity. An interest rate of 5% shall be used to value death benefits other than the decreasing term insurance portion of a refund annuity. For deferred annuities, k_1, k_2, k_3, n_1, and n_2 are defined in § 2619.45.

[19] 5 U.S.C. 553(b)(3)(B) (1988).

[20] To the extent that there may be a particular reason in a particular case to know, for example, whether a particular issue had been raised before WAPA, see CREDA Request for Rehearing at 14–15, the Commission still retains the ability to obtain that information. 18 CFR 300.10(h). However, that is a far cry from the routine filing of an extensive procedural history in every case—which is what CREDA seeks, when CREDA argues that the Commission should not delete 18 CFR 300.10(f)(2)(i).

Rate set	For plans with a valuation date		Immediate annuity rate (percent)	Deferred annuities				
	On or after	Before		k_1	k_2	k_3	n_1	n_2
* * *	*	*	*	*	*	*		
101	12–1–92	1–1–93	6.00	1.0525	1.0400	1.0400	7	8
102	1–1–93		5.75	1.0500	1.0400	1.0400	7	8

Issued in Washington, DC, on this 8th day of December, 1992.

James B. Lockhart III,

Executive Director, Pension Benefit Guaranty Corporation.

[FR Doc. 92–30275 Filed 12–14–92; 8:45 am]

BILLING CODE 7708–01–M

29 CFR Part 2619

Valuation of Plan Benefits in Single-Employer Plans; Expected Retirement Age

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: This rule amends the Pension Benefit Guaranty Corporation's regulation on Valuation of Plan Benefits in Single-Employer Plans (29 CFR part 2619) by adding a new Table I–93 to appendix D. Table I–93 applies to any plan being terminated either in a distress termination or involuntarily by the PBGC, with a valuation date falling in 1993, and is used to determine expected retirement ages for plan participants. This Table is needed in order to compute the value of early retirement benefits and, thus, the total value of benefits under the plan.

EFFECTIVE DATE: January 1, 1993.

FOR FURTHER INFORMATION CONTACT: Renae R. Hubbard, Special Counsel, Office of the General Counsel (22500), Pension Benefit Guaranty Corporation, 2020 K Street, NW., Washington, DC 20006; 202–778–8850 (202–778–8859 for TTY and TDD). (These are not toll-free numbers.)

SUPPLEMENTARY INFORMATION: The regulation of the Pension Benefit Guaranty Corporation ("PBGC") on Valuation of Plan Benefits in Single-Employer Plans (29 CFR part 2619) sets forth the methods for valuing plan benefits of terminating single-employer plans covered under Title IV of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). Under ERISA section 4041(c), plans wishing to terminate in a distress termination generally must value guaranteed benefits and benefit liabilities under the plan using formulas set forth in part 2619, subpart C. (Plans terminating in a standard termination may, for purposes of the Standard Termination Notice filed with PBGC, use these formulas to value benefit liabilities, although this is not required.) In addition, when the PBGC terminates an underfunded plan involuntarily pursuant to ERISA Section 4042(a), it uses the subpart C formulas to determine the amount of the plan's underfunding.

Under § 2619.46, early retirement benefits are valued based on the annuity starting date, if a retirement date has been selected, or the expected retirement age, if the annuity starting date is not known on the valuation date. Subpart D of part 2619 sets forth rules for determining the expected retirement ages for plan participants entitled to early retirement benefits. Appendices D and E of part 2619 contain tables and examples to be used in determining the expected early retirement ages.

There are two sets of tables in appendix D. The first set, Selection of Retirement Rate Category (I–79 through I–92), is used to determine whether a participant has a low, medium, or high probability of retiring early. The second set of tables, Expected Retirement Ages for Individuals in the Low/Medium/High Categories (II–A, II–B, and II–C), is used to determine the expected retirement age after the probability of early retirement has been determined.

The first set of tables determines the probability of early retirement based on the year a participant would reach normal retirement age and the participant's monthly benefit at normal retirement age. The second set of tables establishes, by probability category, the expected retirement age based on both the earliest age a participant could retire under the plan and the normal retirement age under the plan. This expected retirement age is used to compute the value of the early retirement benefit and, thus, the total value of benefits under the plan.

Tables I–79 through I–92 in appendix D establish retirement rate categories for the calendar years 1979 through 1992. The table for each year applies only to plans with valuation dates in that year. This document amends appendix D to add Table I–93 in order to provide an updated correlation, appropriate for calendar year 1993, between the amount of a participant's benefit and the probability that the participant will elect early retirement. Table I–93 will be used to value benefits in plans with valuation dates that occur during calendar year 1993.

The PBGC has determined that notice of and public comment on this rule are impracticable and contrary to the public interest.

Plan administrators need to be able to estimate accurately the value of plan benefits as early as possible before initiating the termination process. For that purpose, if a plan has a valuation date in 1993, the plan administrator needs the updated table being promulgated in this rule. Accordingly, the public interest is best served by issuing this table expeditiously, without an opportunity for notice and comment, to allow as much time as possible to estimate the value of plan benefits with the proper table for plans with valuation dates in early 1993. Moreover, because of the need to provide immediate guidance for the valuation of benefits under such plans, and because no adjustment by ongoing plans is required by this amendment, the PBGC finds that good cause exists for making this amendment to the regulation effective less than 30 days after publication.

The PBGC has determined that this is not a "major rule" under the criteria set forth in Executive Order 12291 because it will not result in an annual effect on the economy of $100 million or more, a major increase in costs for consumers or individual industries, or significant adverse effects on competition, employment, investment, productivity or innovation.

Because no general notice of proposed rulemaking is required for this regulation, the Regulatory Flexibility Act of 1980 does not apply (5 U.S.C. 601(2)).

List of Subjects in 29 CFR Part 2619

Employee benefit plans, Pension insurance, Pensions.

In consideration of the foregoing, appendix D to part 2619 of subchapter C of chapter XXVI of title 29, Code of Federal Regulations, is hereby amended as follows:

PART 2619—[AMENDED]

1. The authority citation for part 2619 continues to read as follows:

Authority: 29 U.S.C. 1301(a), 1302(b)(3), 1341, 1344, and 1362.

2. Appendix D to part 2619 is amended by adding Table I–93 as follows:

Appendix D—Tables Used to Determine Expected Retirement Age

* * * * *

TABLE I–93.—SELECTION OF RETIREMENT RATE CATEGORY

[For plans with valuation dates after December 31, 1992, and before January 1, 1994]

Participant reaches NRA in year—	Participant's retirement rate category is—			
	Low[1] if monthly benefit at NRA is less than—	Medium[2] if monthly benefit at NRA is—		High[3] if monthly benefit at NRA is greater than—
		From	To—	
1994	368	368	1,549	1,549
1995	380	380	1,599	1,599
1996	392	392	1,650	1,650
1997	405	405	1,703	1,703
1998	417	417	1,755	1,755
1999	430	430	1,810	1,810
2000	444	444	1,866	1,866
2001	457	457	1,924	1,924
2002	472	472	1,983	1,983
2003 or later	486	486	2,045	2,045

[1] Table II–A.
[2] Table II–B.
[3] Table II–C.

Issued at Washington, DC this 8th day of December, 1992.

James B. Lockhart III,

Executive Director, Pension Benefit Guaranty Corporation.

[FR Doc. 92–30276 Filed 12–14–92; 8:45 am]

BILLING CODE 7708–01–M

29 CFR Part 2621

Limitation on Guaranteed Benefits in Single-Employer Plans

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: This rule amends appendix A of the Limitation on Guaranteed Benefits regulation of the Pension Benefit Guaranty Corporation ("PBGC") by adding the maximum guaranteeable pension benefit that may be paid by the PBGC with respect to a plan participant in a single-employer pension plan that terminates in 1993. The maximum guaranteeable benefit is computed in accordance with the formula in section 4022(b)(3) of the Employee Retirement Income Security Act of 1974, which provides that the maximum guaranteeable benefit is based on the contribution and benefit base determined under section 230 of the Social Security Act. The latter number is adjusted annually, and that adjustment automatically changes the dollar amount of the maximum guaranteeable benefit paid by PBGC. The effect of this amendment is to advise plan participants and beneficiaries of the increased maximum guaranteeable benefit for 1993.

EFFECTIVE DATE: January 1, 1993.

FOR FURTHER INFORMATION CONTACT: Renae R. Hubbard, Special Counsel, Office of the General Counsel, Code 22500, Pension Benefit Guaranty Corporation, 2020 K Street, NW., Washington, DC 20006, 202–778–8850 (202–778–8859 for TTY and TTD). These are not toll-free numbers.

SUPPLEMENTARY INFORMATION: Section 4022(b) of the Employee Retirement Income Security Act of 1974, *as amended*, ("ERISA") provides for certain limitations on benefits guaranteed by the Pension Benefit Guaranty Corporation ("PBGC") in terminating single-employer pension plans covered under Title IV of ERISA. One of the limitations set forth in section 4022(b)(3) is a dollar ceiling on the amount of the monthly benefit that may be paid to a plan participant by the PBGC. Subparagraph (B) of section 4022(b)(3) provides that the amount of monthly benefit payable in the form of a life annuity beginning at age 65 shall not exceed "$750 multiplied by a fraction, the numerator of which is the contribution and benefit base (determined under section 230 of the Social Security Act) in effect at the time the plan terminates and the denominator of which is such contribution and benefit base in effect in calendar year 1974 ($13,200)". This formula is also set forth in § 2621.3(a)(2) of the PBGC's regulation entitled Limitation on Guaranteed Benefits in Single-Employer Plans (29 CFR part 2621).

The Social Security Amendments of 1977 added special increases to the contribution and benefit base. However, the amended Social Security Act specifically states that, for the purpose of section 4022(b)(3)(B) of ERISA, the contribution and benefit base for each year after 1976 will be the base that would have been determined for each year if the law in effect immediately before the amendment had remained in effect without change (the "old-law contribution and benefit base"). 42 U.S.C. 430(d) (1982). Section 10208 of the Omnibus Budget Reconciliation Act of 1989 (Public Law 101–239, enacted December 19, 1989) ("OBRA '89") amended section 230 of the Social Security Act to provide for the inclusion of certain deferred compensation in the determination of the contribution and benefit base for 1990 and future years. Each year the Social Security Administration determines, and notifies the PBGC of, the old-law contribution and benefit base to be used by the PBGC under these provisions.

The PBGC has been notified by the Social Security Administration that, under section 230 of the Social Security Act as amended by OBRA '89, $42,900 is the old-law contribution and benefit base that is to be used to calculate the PBGC maximum guaranteeable benefit for 1993. Accordingly, the formula under section 4022(b)(3)(B) of ERISA and 29 CFR § 2621.3(a)(2) is: $750 multiplied by $42,900/$13,200. Thus, the maximum monthly benefit guaranteeable by the PBGC in 1993 is $2,437.50 per month in the form of a life annuity beginning at age 65. If a benefit is payable in a different form or begins at a different age, the maximum guaranteeable amount will be the actuarial equivalent of $2,437.50 per month.

Appendix A to part 2621 lists the maximum guaranteeable benefit payable by the PBGC to participants in single-employer plans that have terminated in each year from 1974 through 1992. This amendment updates appendix A for plans that terminate in 1993.

Because the maximum guaranteeable benefit is determined according to the formula in section 4022(b)(3)(B) of ERISA, and this amendment makes no change in its method of calculation but simply lists the 1993 maximum guaranteeable benefit amount for the public's knowledge, general notice of proposed rulemaking is not required. Moreover, because the 1993 maximum guaranteeable benefit is effective, under the statute, at the time that the Social Security contribution and benefit base is effective, *i.e.*, January 1, 1993, and is not dependent on the issuance of this regulation, the PBGC finds that good cause exists for making this amendment effective less than 30 days after publication (5 U.S.C. 553).

The PBGC has determined that this is not a "major rule" under the criteria set forth in Executive Order 12291, because it will not result in an annual effect on the economy of $100 million or more, a major increase in costs for consumers or individual industries, or significant adverse effects on competition, employment, investment, productivity, or innovation.

Because no general notice of proposed rulemaking is required for this regulation, the Regulatory Flexibility Act of 1980 does not apply (5 U.S.C. 601(2)).

List of Subjects in 29 CFR Part 2621

Employee benefit plans, Pension insurance, and Pensions.

In consideration of the foregoing, part 2621 of subchapter C, chapter XXVI, title 29, Code of Federal Regulations, is hereby amended as follows:

PART 2621—LIMITATION ON GUARANTEED BENEFITS IN SINGLE-EMPLOYER PLANS

1. The authority citation for part 2621 continues to read as follows:

Authority: 29 U.S.C. 1302, 1322, 1322b.

2. Appendix A to part 2621 is amended by adding a new entry to read as follows. The introductory text is republished for the convenience of the reader and remains unchanged.

Appendix A to Part 2621—Maximum Guaranteeable Monthly Benefit

The following table lists by year the maximum guaranteeable monthly benefit payable in the form of a life annuity commencing at age 65 as described by § 2621.3(a)(2) to a participant in a plan that terminated in that year:

Year	Maximum guaranteeable monthly benefit
* * * * *	
1993	2,437.50

Issued at Washington, DC this 8th day of December, 1992.

James B. Lockhart III,

Executive Director, Pension Benefit Guaranty Corporation.

[FR Doc. 92–30277 Filed 12–14–92; 8:45 am]

BILLING CODE 7708–01–M

29 CFR Part 2676

Valuation of Plan Benefits and Plan Assets Following Mass Withdrawal—Interest Rates

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: This is an amendment to the Pension Benefit Guaranty Corporation's regulation on Valuation of Plan Benefits and Plan Assets Following Mass Withdrawal (29 CFR part 2676). The regulation prescribes rules for valuing benefits and certain assets of multiemployer plans under sections 4219(c)(1)(D) and 4281(b) of the Employee Retirement Income Security Act of 1974. Section 2676.15(c) of the regulation contains a table setting forth, for each calendar month, a series of interest rates to be used in any valuation performed as of a valuation date within that calendar month. On or about the fifteenth of each month, the PBGC publishes a new entry in the table for the following month, whether or not the rates are changing. This amendment adds to the table the rate series for the month of January 1993.

EFFECTIVE DATE: January 1, 1993.

FOR FURTHER INFORMATION CONTACT: Deborah C. Murphy, Attorney, Office of the General Counsel (22500), Pension Benefit Guaranty Corporation, 2020 K Street, NW., Washington, DC 20006; 202–778–8820 (202–778–1958 for TTY and TDD). (These are not toll-free numbers.)

SUPPLEMENTARY INFORMATION: The PBGC finds that notice of and public comment on this amendment would be impracticable and contrary to the public interest, and that there is good cause for making this amendment effective immediately. These findings are based on the need to have the interest rates in this amendment reflect market conditions that are as nearly current as possible and the need to issue the interest rates promptly so that they are available to the public before the beginning of the period to which they apply. (See 5 U.S.C. 553(b) and (d).) Because no general notice of proposed rulemaking is required for this amendment, the Regulatory Flexibility Act of 1980 does not apply (5 U.S.C. 601(2)).

The PBGC has also determined that this amendment is not a "major rule" within the meaning of Executive Order 12291 because it will not have an annual effect on the economy of $100 million or more; or create a major increase in costs or prices for consumers, individual industries, or geographic regions; or have significant adverse effects on competition, employment, investment, or innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

List of Subjects in 29 CFR Part 2676

Employee benefit plans, and Pensions.

In consideration of the foregoing, part 2676 of subchapter H of chapter XXVI of title 29, Code of Federal Regulations, is amended as follows:

PART 2676—VALUATION OF PLAN BENEFITS AND PLAN ASSETS FOLLOWING MASS WITHDRAWAL

1. The authority citation for part 2676 continues to read as follows:

Authority: 29 U.S.C. 1302(b)(3), 1399(c)(1)(D), and 1441(b)(1).

2. In § 2676.15, paragraph (c) is amended by adding to the end of the table of interest rates the new entries to read as follows:

§ 2676.15 Interest.

* * * * *

(c) *Interest Rates.*

For valuation dates occurring in the month:	The values for i_k are:															
	i_1	i_2	i_3	i_4	i_5	i_6	i_7	i_8	i_9	i_{10}	i_{11}	i_{12}	i_{13}	i_{14}	i_{15}	i_u
*	*		*			*			*			*		*		
January 1993	.06375	.0625	.06125	.06	.05875	.0575	.0575	.0575	.0575	.0575	.05625	.05625	.05625	.05625	.05625	.055

Issued at Washington, DC, on this 8th day of December 1992.

James B. Lockhart III,

Executive Director, Pension Benefit Guaranty Corporation.

[FR Doc. 92–30274 Filed 12–14–92; 8:45 am]

BILLING CODE 7708–01–M

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900–AF93

Aggravation of Preservice Disability

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) has amended its adjudication regulations concerning aggravation of preservice disability and the presumption of soundness upon service entry. The intended effect of this amendment is to bring VA regulations into conformance with the statutory provisions pertaining to presumption of soundness.

EFFECTIVE DATE: This amendment is effective May 1, 1974, the date provided by Public Law 93–295.

FOR FURTHER INFORMATION CONTACT: John Bisset, Jr., Consultant, Regulations Staff, Compensation and Pension Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 233–3005.

SUPPLEMENTARY INFORMATION: In a memorandum dated May 18, 1992, VA's Office of General Counsel pointed out that parts of 38 CFR 3.306 are outdated since they fail to reflect the changes in law which made the wartime aggravation criteria applicable to peacetime service after December 31, 1946. In 1966, Congress added section 1137 to title 38, United States Code, to apply the wartime presumption of sound condition upon entry onto active duty to all veterans having service after January 31, 1955 (See section 7 of Pub. L. 89–358, 80 Stat. 12, 27). In 1974, section 205 of the Veterans Disability Compensation and Survivor Benefits Act of 1974 (Pub. L. 93–295, 88 Stat. 180, 183), amended 38 U.S.C. 1137 to strike out the date January 31, 1955, and substitute December 31, 1946. As a result of this amendment, the provisions of 38 U.S.C. 1132, which provide a less generous presumption of soundness for veterans with peacetime service, do not apply to veterans with service after December 31, 1946. Rather, the same presumption of soundness for wartime veterans applies to these veterans. No conforming amendments were made to 38 CFR 3.306, however, and we are now correcting that oversight.

VA is issuing a final rule to amend the provisions of 38 CFR 3.306. This amendment is necessary to make the regulatory provisions concerning peacetime service after December 31, 1946, and the presumption of soundness conform with the statute. Because this amendment implements statutory changes, publication as a proposal for public notice and comment is unnecessary.

Since a notice of proposed rulemaking is unnecessary and will not be published, this amendment is not a "rule" as defined in and made subject to the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–602. In any case this regulatory amendment will not have a significant economic impact on a substantial number of small entities as they are defined in the RFA, 5 U.S.C. sections 601–612. This amendment will not directly affect any small entity.

In accordance with Executive Order 12291, Federal Regulation, the Secretary has determined that this regulatory amendment is non-major for the following reasons:

(1) It will not have an annual effect on the economy of $100 million or more.

(2) It will not cause a major increase in costs or prices.

(3) It will not have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Catalog of Federal Domestic Assistance program number is 64.109.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Handicapped, Health care, Pensions, Veterans.

Approved October 6, 1992.

Anthony J. Principi,

Acting Secretary of Veterans Affairs.

For the reasons set out in the preamble, 38 CFR part 3 is amended as set forth below:

PART 3—ADJUDICATION

Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

1. The authority citation for part 3, subpart A, is revised to read as follows:

Authority: 38 U.S.C. 501(a).

§ 3.306 [Amended]

2. In § 3.306, remove the heading for paragraph (b) and insert, in its place, the heading "*Wartime service; peacetime service after December 31, 1946*"; remove the heading for paragraph (c), and insert, in its place the heading "*Peacetime service prior to December 7, 1941*".

[FR Doc. 92–30075 Filed 12–14–92; 8:45 am]

BILLING CODE 8320–01–M

38 CFR Part 3

RIN 2900–AD97

Dependency and Income

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) has amended its adjudication regulations regarding dependency, income and estate. The amendments are required to implement both legislation removing certain income sources from consideration in entitlement determinations and opinions of the VA General Counsel dealing with income computations. The intended results are to ensure that the income sources identified by legislation are excluded from income computations and that VA regulations provide adequate guidelines for determining countable income.

EFFECTIVE DATE: These changes are effective January 14, 1993.

FOR FURTHER INFORMATION CONTACT: Steven Thornberry, Consultant, Regulations Staff, Compensation and Pension Service, Veterans Benefits Administration, 810 Vermont Avenue, NW., Washington, DC 20420, telephone (202) 233–3005.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of June 5, 1991, at pages 25645 through 25649, VA published proposed rules specifying sources of income to be excluded from income or net worth computations under VA pension and parents' dependency and indemnity compensation (DIC) programs, and clarifying the guidelines established for certain income computations. The rules were proposed to implement legislation excluding specific income sources from entitlement determinations and opinions of the VA General Counsel dealing with income computations. Interested parties were invited to submit written comments on or before July 5, 1991. One comment was received, from the Paralyzed Veterans of America.

The commenter expressed concern that the amendments to 38 CFR 3.271(a)

and 3.273(d) indicate a change in VA's method of computing income, in that unanticipated "irregular" income would be counted from the beginning of the 12-month annualization period in which it is received rather than from actual date of receipt. He pointed out that this would unreasonably require claimants to project receipt of unanticipated income in order to avoid overpayments. VA does not concur with the commenter's interpretation or conclusions.

A basic concept of improved pension is annualization. VA computes a beneficiary's entitlement on the basis of estimated countable income over a given 12-month annualization period (not necessarily a calendar year), and projects the amount of pension payable for that same period. Each beneficiary is required to report actual income received during the annualization period by yearly submission of an eligibility verification report (EVR). The pension award then will be adjusted, if necessary, on the basis of actual income received during the annualization period.

However, when a claimant receives unanticipated income subsequent to the initial award of pension benefits, VA adjusts payments from the first of the month following the month in which the new income is initially received, not from the beginning of the current annualization period (38 CFR 3.660(a)(2)). This procedure, commonly called the "end-of-the-month (EOM) rule, " represents VA's established policy since the inception of improved pension on January 1, 1979.

These amendments do not affect the EOM rule. The definitions of recurring, irregular, and nonrecurring income in § 3.271(a) provide regulatory guidance for classifying income types, thereby promoting consistency in entitlement determinations. Section 3.273(d) provides a regulatory basis for computing recurring and irregular income to determine countable income for VA purposes. Introductory text added by this change specifically states that changes in benefit payments based on the provisions of that section will be determined under the provisions of § 3.31 or § 3.660, whichever is applicable. In the situation instanced by PVA, § 3.660 would be for application. Nonetheless, we understand the concerns of the commenter and have added language to 3.271(a) and 3.273(d) to clarify our intent.

VA regulations require beneficiaries to report changes in income or other circumstances that could affect benefit entitlement (38 CFR 3.660(a)(1)). VA acts as quickly as possible on evidence indicating entitlement changes, but it is not possible to avoid creation of overpayments altogether. We do not expect beneficiaries to project receipt of income that is truly unanticipated, but it is to their advantage to make reasonable estimates of income from sources that previously have provided irregular income and to furnish timely reports of newly acquired income. Whereas adjustments for unanticipated income are subject to application of the EOM rule, an adjustment to previously underreported income is made from the beginning of the annualization period for which the incorrect income had been reported. The amendments to §§ 3.271 and 3.273 will not have the effect of increasing either the number or amounts of overpayments. We foresee no adverse impact as anticipated by the commenter.

VA appreciates the comment received in response to the proposed regulations, which now are adopted with the following technical corrections, in addition to the changes to § 3.271(a) and § 3.273(d) mentioned above: we are subdividing § 3.261 into paragraphs (a), (b), and (c) and including an omitted item of income to paragraph (a)(14); in item (28) of § 3.261(a) the rows designating inclusion to or exclusion from income have been interchanged; in the first sentence of § 3.262(l)(4), the words "surviving spouse" have been replaced by the word "parent"; references to § 3.263 (m) and (m)(2) have been corrected to § 3.262 (m) and (m)(2); we have rewritten § 3.262 (r) and (s) to clarify the income exclusions there referenced; in the introductory text of § 3.660(b) the words "the following" have been replaced by "a"; the reference to 38 U.S.C. 5110(h) in the introductory text of § 3.660(b) has been moved to its proper place following § 3.660(b)(1).

Title I of Public Law 100–383, the Civil Liberties Act of 1988, provided redress in the amount of $20,000.00 to certain individuals of Japanese ancestry who were interned or relocated by the Federal government during WWII. The bill expressly provided that these payments shall not be included as income or resources for determining eligibility to benefits described in 31 U.S.C. 3803(c)(2)(C). A recent opinion of VA's General Counsel (O.G.C. *Prec. 3–92*) has held that for purposes of improved pension and parents' DIC, which are found in those chapters of title 38 U.S.C. referenced by the cited section of title 31, these payments are not countable as income or for net worth determinations. The opinion further stated that these payments are countable as income and net worth under 306 pension and old law pension. These benefits are no longer in force under title 38, but under the savings provision (section 306) of Public Law 95–588, which introduced improved pension. We are taking this opportunity to amend § 3.261, § 3.263, § 3.262, § 3.272, and § 3.275 to implement the law and the opinion of the General Counsel. Since parents' death compensation also is included within a chapter of title 38 referenced by title 31, our amendment will also reflect that these redress payments are not included for net worth purposes under that program. Since these amendments simply implement the provisions of Public Law 100–383, publication as a proposed rule for comment is not required.

The Secretary hereby certifies that these regulatory amendments will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. The reason for this certification is that these amendments would not directly affect any small entities. Only VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), these amendments are exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

In accordance with Executive Order 12291, Federal Regulation, the Secretary has determined that these regulatory amendments are non-major for the following reasons:

(1) They will not have an annual effect on the economy of $100 million or more.

(2) They will not cause a major increase in costs or prices.

(3) They will not have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Catalog of Federal Domestic Assistance program numbers are 64.104, 64.105, and 64.110.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Handicapped, Health care, Pensions, Veterans.

Approved: October 30, 1992.

Anthony J. Principi,

Acting Secretary of Veterans Affairs.

For the reasons set forth in the preamble, 38 CFR Part 3 is amended to read as follows:

PART 3—ADJUDICATION

1. The authority citation for part 3, subpart A continues to read as follows:

Authority: 105 Stat. 386, 38 U.S.C. 501(a), unless otherwise noted.

§ 3.261 [Amended]

2. In § 3.261 remove the words "protected", "widows", and "Pub. L. 86–211" in the columnar headings and add, in their place, the words "old-law", "surviving spouses" and "section 306", respectively.

3. In § 3.261, the heading titled "Income" is designated as paragraph (a), an unnumbered category is added at the end of item (14), item (28) is revised, new items (35) and (36) are added, and new paragraphs (b) and (c) are added to read as follows:

§ 3.261 Character of income; exclusions and estates.

(a) *Income*

* * * * *

(14) * * *

Annuity under § 653, Pub. L. 100–456	Included	Included	Excluded	Excluded	§ 3.262(r)
* * * * * * *					
(28) Reimbursement for casualty loss (Pub. L. 100–687).	Included	Excluded	Included	Included	§ 3.262(t)
Other fire Insurance	Excluded	Excluded	Excluded	Excluded	§ 3.262(t)
* * * * * * *					
(35) Agent Orange settlement payments	Excluded	Excluded	Excluded	Excluded	§ 3.262(s)
(36) Restitution to individuals of Japanese ancestry (Pub. L. 100–383).	Excluded	Excluded	Included	Included	§ 3.262(u)
(b) Deduction of Amounts Paid by Claimant:					
(1) Unusual medical expenses	Not authorized	Authorized	Not authorized	Authorized	§§ 3.262(b)(i), & (1)
(2) Veteran: just debts, expenses of last illness, and burial.	Not authorized	Authorized, except debts.	Not authorized	Authorized	§§ 3.262(m) & (o)
(3) Veteran's spouse or child: expenses of last illness and burial.	Not authorized	Not authorized	Not authorized	Authorized	§ 3.262(n)
(4) Parent's spouse: just	Not authorized	Authorized			§ 3.262(o)
(5) Prepayments on real property mortgages after death of spouse (Pub. L. 91–588).	Not authorized	Not authorized	Not authorized	Authorized	§ 3.262(k)(6)
(c) Corpus of estate	Considered conditionally.	Not considered	Not considered	Considered	§ 3.263

(Authority: Public Law 101–201).

4. In § 3.262 paragraphs (l)(1) through (l)(4) and the authority citation are revised and paragraphs (r), (s), (t), and (u), and their authority citations are added to read as follows:

§ 3.262 Evaluation of income.

* * * * *

(l) * * *

(1) *Veterans.* For the purpose of section 306 pension, there will be excluded unreimbursed amounts paid by the veteran for unusual medical expenses of self, spouse, and other relatives of the veteran in the ascending as well as descending class who are members or constructive members of the veteran's household and whom the veteran has a moral or legal obligation to support.

(2) *Surviving spouses.* For the purpose of section 306 pension, there will be excluded unreimbursed amounts paid by the surviving spouse for the unusual medical expenses of self, the veteran's children, and other relatives of the surviving spouse in the ascending as well as descending class who are members or constructive members of the surviving spouse's household and whom the surviving spouse has a moral or legal obligation to support.

(3) *Children.* For the purpose of section 306 pension, there will be excluded unreimbursed amounts paid by a child for the unusual medical expenses of self, parent, and brothers and sisters of the child.

(4) *Parents.* For dependency and indemnity compensation purposes there will be excluded unreimbursed amounts paid by the parent for the unusual medical expenses of self, spouse, and other relatives of the parent in the ascending as well as descending class who are members or constructive members of the parent's household and whom the parent has a moral or legal obligation to support. If the combined annual income of the parent and the parent's spouse is the basis for dependency and indemnity compensation, the exclusion is applicable to the combined annual income and extends to the unusual unreimbursed medical expenses of the spouse's relatives in the ascending as well as descending class who are members or constructive members of the household and whom the parent's spouse has a moral or legal obligation to support.

(Authority: 38 U.S.C. 1315(f)(3); Sec. 306, Pub. L. 95–588; 92 Stat. 2508)

* * * * *

(r) *Survivor benefit annuity.* For the purposes of old law pension and section 306 pension, there shall be excluded from computation of income annuity paid by the Department of Defense under the authority of section 653, Public Law 100–456 to qualified surviving spouses of veterans who died prior to November 1, 1953. (September 29, 1988)

(Authority: Sec. 653, Pub. L. 100–456; 102 Stat. 1991)

(s) *Agent Orange settlement payments.* In claims for pension and parents' dependency and indemnity income, there shall be excluded from computation of income payments received by any person in the case of In re Agent Orange Product Liability Litigation in the United States District Court for the Eastern District of New York (MDL No. 381). (January 1, 1989)

(Authority: Pub. L. 101–201, 103 Stat. 1795)

(t) *Reimbursement for casualty loss.* The following sources of reimbursements for casualty loss will not be considered as income in determining entitlement to benefits under the programs specified. Amounts to be excluded from computation in parens' dependency and indemnity compensation claims are limited to amounts of reimbursement which do not exceed the greater of the fair market value or the reasonable replacement cost of the property involved at the time immediately preceding the loss.

(1) Reimbursement for casualty loss of any kind in determining entitlement to parents' dependency and indemnity

compensation benefits. For purposes of paragraph (t) of this section, the term "casualty loss" means the complete or partial destruction of property resulting from an identifiable event of a sudden, unexpected or unusual nature.

(2) Proceeds from fire insurance in determining dependency of a parent for compensation purposes or in determining entitlement to old-law and section 306 pension benefits.

(Authority: 38 U.S.C. 1315(f))

(u) *Restitution to individuals of Japanese ancestry.* In claims for parents' death compensation and parents' dependency and indemnity compensation, there shall be excluded from income computation any payment made as restitution under Public Law 100–383 to individuals of Japanese ancestry who were interned, evacuated, or relocated during the period December 7, 1941, through June 30, 1946, pursuant to any law, Executive Order, Presidential proclamation, directive, or other official action respecting these individuals. (August 10, 1988)

(Authority: Sec. 105, Pub. L. 100–383; 102 Stat. 905)

§ 3.262 [Amended]

5. In § 3.262(g)(2), third sentence, remove the words "Where eligibility to pension is subject to determination under Public Law 86–211 (73 Stat. 432)" and add, in their place, the words "For purposes of section 306 pension".

6. In § 3.262(h), introducing text, second sentence, remove the word "widow" and add, in its place, the words "surviving spouse".

7. In § 3.262(j)(2), first and second sentences, remove the words "under Public Law 86–211 (73 Stat. 432)" and "under Public Law 86–211" and add the words "section 306" in front of the word "pension" wherever it appears.

8. In § 3.262(j)(3), remove the word "*protected*" in the paragraph heading and add, in its place, the word "*old-law*".

9. In § 3.262(k)(1), second sentence, remove the words "pension purposes under the provisions of Public Law 86–211 (73 Stat. 432)" and add, in their place, the words "section 306 pension purposes" and revise the authority citation to read "(Authority: Sec. 306, Public Law 95–588; 92 Stat. 2508)".

10. In § 3.262(k)(5) and (k)(6) remove the words "Public Law 86–211" and "Public Law 86–211 (73 Stat. 432)" wherever they appear, and add, in their place, the words "section 306 pension".

11. In § 3.262(m), introductory text, remove the words "Public Law 86–211 (73 Stat. 432)" and add, in their place, the words "section 306"; in paragraph (m)(1) remove the word "widow" and add, in its place, the words "surviving spouse" and remove the words "she, as wife,".

12. In § 3.262(m)(2) remove the word "widow" wherever it appears and add, in its place, the words "surviving spouse"; remove the word "his" where it appears, and add, in its place, the words "the veteran's"; and remove the words "for the expenses of his".

13. In § 3.262(m) the authority citation is revised to read

"(Authority: Sec. 306, Pub. L. 95–588; 92 Stat. 2508)".

14. In § 3.262(n), introductory text, remove the words "Public Law 86–211 (73 Stat. 432)", and add, in their place, the words "section 306"; in paragraph (n)(1) remove the words "him" and "his", and add, in their place, the words "the veteran" and "the veteran's"; in paragraph (n)(2), remove the words "wife or widow" and "her as wife or widow" and add, in their place, the words "spouse or surviving spouse", and "the spouse or surviving spouse", and revise the authority citation to read

"(Authority: Sec. 306, Pub. L. 95–588; 92 Stat. 2508)".

15. In § 3.262(o) the authority citation appearing at the end of the paragraph is revised to read

"(Authority: 38 U.S.C. 1315(f))".

16. In § 3.262(p) remove the words "the wife or husband" and add, in their place, the words "spouse or surviving spouse" and remove the words "widow, widower".

§ 3.263 [Amended]

17. In § 3.263(a) remove the words "widow, widower" wherever they appear and add, in their place, the words "surviving spouse".

18. In § 3.263 add paragraphs (e) and (f) and their authority citations to read as follows:

§ 3.263 Corpus of estate; net worth.

* * * * *

(e) *Agent Orange settlement payments.* There shall be excluded from the corpus of estate or net worth of a claimant any payment made from the Agent Orange Settlement Fund or any other fund established pursuant to the settlement in the In re Agent Orange product liability litigation, M.D.L. No. 381 (E.D.N.Y.). (January 1, 1989).

(Authority: Pub. L. 101–201, 103 Stat. 1795)

(f) *Restitution to individuals of Japanese ancestry.* In claims for parents' death compensation, there shall be excluded from the corpus of estate or net worth of a claimant any payment made as restitution under Public Law 100–383 to individuals of Japanese ancestry who were interned, evacuated, or relocated during the period December 7, 1941, through June 30, 1946, pursuant to any law, Executive order, Presidential proclamation, directive, or other official action respecting these individuals. (August 10, 1988)

(Authority: Sec. 105, Pub. L. 100–383; 102 Stat. 905)

19. In § 3.271 paragraphs (a) (1) through (3) are added, and paragraph (f) is amended by redesignating the introductory text as paragraph (f)(1) and adding paragraph (f)(2) to read as follows:

§ 3.271 Computation of income.

(a) * * *

(1) *Recurring income.* Recurring income means income which is received or anticipated in equal amounts and at regular intervals (e.g., weekly, monthly, quarterly, etc.), and which will continue throughout an entire 12-month annualization period. The amount of recurring income for pension purposes will be the amount received or anticipated during a 12-month annualization period. Recurring income which terminates prior to being counted for at least one full 12-month annualization period will be treated as nonrecurring income for computation purposes.

(2) *Irregular income.* Irregular income means income which is received or anticipated during a 12-month annualization period, but which is received in unequal amounts or at irregular intervals. The amount of irregular income for pension purposes will be the amount received or anticipated during a 12-month annualization period following initial receipt of such income.

(3) *Nonrecurring income.* Nonrecurring income means income received or anticipated on a one-time basis during a 12-month annualization period (e.g., an inheritance). Pension computations of income will include nonrecurring income for a full 12-month annualization period following receipt of the income.

* * * * *

(f) * * *

(2) When a claimed dependent is shown to have income which exceeds the additional amount of benefits payable based on the claimed dependency, but evidence requirements of § 3.204, § 3.205, § 3.209, or § 3.210 have not been met, the maximum annual rate of improved pension shall be determined without consideration of the claimed dependency. This amount

shall be reduced by an amount which includes the income of the unestablished dependent. Adjustments in computation of the maximum annual rate of improved pension shall occur following receipt of evidence necessary to establish the dependency.

(Authority: 38 U.S.C. 501(a))

* * * * *

20. In § 3.272 paragraph (d) and its authority citation are revised and paragraphs (n), (o), and (p), and their authority citations are added to read as follows:

§ 3.272 Exclusions from income.

* * * * *

(d) *Reimbursement for casualty loss.* Reimbursement of any kind for any casualty loss. The amount to be excluded is not to exceed the greater of the fair market value or the reasonable replacement cost of the property involved at the time immediately preceding the loss. For purposes of this paragraph, the term "casualty loss" means the complete or partial destruction of property resulting from an identifiable event of a sudden, unexpected or unusual nature.

(Authority: 38 U.S.C. 1503(a)(5))

* * * * *

(n) *Survivor benefit annuity.* Annuity paid by the Department of Defense under the authority of section 653, Public Law 100–456 to qualified surviving spouses of veterans who died prior to November 1, 1953. (September 29, 1988)

(Authority: Sec. 653, Pub. L. 100–456; 102 Stat. 1991)

(o) *Agent Orange settlement payments.* Payments received by any person in settlement of the case of In re Agent Orange product liability litigation in the United States District Court for the Eastern District of New York (M.D.L. No. 381). (January 1, 1989)

(Authority: Pub. L. 101–201, 103 Stat. 1795)

(p) *Restitution to individuals of Japanese ancestry.* Any payment made as restitution under Public Law 100–383 to individuals of Japanese ancestry who were interned, evacuated, or relocated during the period December 7, 1941, through June 30, 1946, pursuant to any law, Executive order, Presidential proclamation, directive, or other official action respecting these individuals. (August 10, 1988)

(Authority: Sec. 105, Pub. L. 100–383; 102 Stat. 905)

21. In § 3.273 add an introductory text, add a sentence at the end of paragraph (a), and add paragraph (d) to read as follows:

§ 3.273 Rate computation.

The commencement date of change in benefit payments based on rate computations under the provisions of this section will be determined under the provisions of § 3.31 or § 3.660.

(a) * * * Recomputation of rates due to changes in the maximum annual pension rate or rate of income following the initial date of entitlement are subject to the provisions of paragraph (b) of this section.

* * * * *

(d) *Recurring and irregular income.* The amount of recurring and irregular income anticipated or received by a beneficiary shall be added to determine the beneficiary's annual rate of income for a 12-month annualization period commencing at the beginning of the 12-month annualization, subject to the provisions of § 3.660(a)(2) of this chapter.

22. In § 3.273(a) and (b)(1) remove the words "annual rate of".

23. In § 3.273(b)(2) remove the words "annual rate" and add, in their place, the word "amount".

24. In § 3.273(c) remove the words "12-month period" and add, in their place, the words "12-month annualization period".

25. In § 3.275 add paragraphs (f) and (g) and their authority citations to read as follows:

§ 3.275 Criteria for evaluating net worth.

* * * * *

(f) *Agent Orange settlement payments.* There shall be excluded from the corpus of the estate or net worth of a claimant any payment made from the Agent Orange Settlement Fund or any other fund established pursuant to the settlement in the In re Agent Orange product liability litigation, M.D.L. No. 381 (E.D.N.Y.). (January 1, 1989)

(Authority: Pub. L. 101–201, 103 Stat. 1795)

(g) *Restitution to individuals of Japanese ancestry.* There shall be excluded from the corpus of estate or net worth of a claimant any payment made as restitution under Public Law 100–383 to individuals of Japanese ancestry who were interned, evacuated, or relocated during the period December 7, 1941, through June 30, 1946, pursuant to any law, Executive order, Presidential proclamation, directive, or other official action respecting these individuals. (August 10, 1988)

(Authority: Sec. 105, Pub. L. 100–383; 102 Stat. 905)

§ 3.277 [Amended]

26. In § 3.277 the authority citation appearing at the end of the section is revised to read "(Authority: 38 U.S.C. 1506)".

§ 3.660 [Amended]

27. In § 3.660(a)(2) remove the word "Contingency" in the paragraph heading and add, in its place, the words "Effective dates".

28. In § 3.660(b), introductory text, remove the words "year", and "calendar year" and add, in their place, the words "12-month annualization period"; and delete the authority citation "(38 U.S.C. 5110(h).)" following the first sentence.

29. In § 3.660(b)(1) remove the words "January 1 of that year" and add, in their place, the words "the beginning of the appropriate 12-month annualization period"; and add an authority citation at the end of the paragraph to read as follows: "(38 U.S.C. 5110(h))".

30. In § 3.660(b)(2) remove the word "year" the first two times it appears and the words "within that year" and add, in their place, the words "12-month annualization period" and "within that period", respectively.

§ 3.661 [Amended]

31. In § 3.661, remove the words *"Income and net worth questionnaires"* in the section heading and add, in their place, the words *"Eligibility Verification Reports"*.

32. In § 3.661, paragraphs (a)(1) and (b), heading, remove the word "questionnaire" wherever it appears and add, in its place, the word "report".

33. In § 3.661(b)(1) add the word "calendar" before the word "year" each time it appears.

34. In § 3.661(b)(2) remove the words "year" and "income questionnaire", wherever they appear, and add, in their place, the words "12-month annualization period" and "Eligibility Verification Report", respectively.

[FR Doc. 92–30077 Filed 12–14–92; 8:45 am]
BILLING CODE 8320–01–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52 and 81

[SC–026–5602; FRL–4537–9]

Approval of Maintenance Plan and Designation of Areas for Air Quality Planning Purposes

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: On July 20, 1992, the State of South Carolina through the Department

of Health and Environmental Control (DHEC) submitted a maintenance plan and a request to redesignate Cherokee County to attainment for ozone. The State has met the requirement for redesignation contained in section 107(d)(3)(E) of the Clean Air Act as amended in 1990 (CAA). EPA approves the maintenance plan and the redesignation of Cherokee County, South Carolina, to attainment for ozone.

DATES: This action will be effective on February 16, 1993 unless notice is received within 30 days that someone wishes to submit adverse or critical comments. If the effective date is delayed, timely notice will be published in the **Federal Register.**

ADDRESSES: Copies of the material submitted by South Carolina may be examined during normal business hours at the following locations:

Region IV Air Programs Branch, Environmental Protection Agency, 345 Courtland Street, Atlanta, Georgia 30365.

Bureau of Air Quality Control, South Carolina Department of Health and Environmental Control, 2600 Bull Street, Columbia, South Carolina 29201.

FOR FURTHER INFORMATION CONTACT: Scott Miller of the Region IV Air Programs Branch at 404–347–2864 and at the above address.

SUPPLEMENTARY INFORMATION: In a **Federal Register** notice published November 6, 1991, Cherokee County was designated as nonattainment for ozone. This designation became effective 60 days later on January 6, 1992. On July 20, 1992, The Bureau of Air Quality Control (BAQC) of the South Carolina Department of Health and Environmental Control (DHEC) submitted a request for Cherokee County to be redesignated to attainment for ozone. This request was based on three years (1989, 1990, and 1991) of quality assured monitoring data which showed that Cherokee County had not violated the National Ambient Air Quality Standard (NAAQS) for ozone. The State of South Carolina has met all of the CAA requirements for redesignation pursuant to section 107(d)(3)(E). The requirements of section 107(d)(3)(E) are as follows:

Section 107(d)(3)(E)(i) The Administrator Has Determined That the Area Has Attained the National Ambient Air Quality Standard

South Carolina submitted air quality data showing that Cherokee County has attained the ozone NAAQS for ozone for the three year period, 1989–1991. During that period, there were no exceedances, and hence, no violations of the ozone standard.

Section 107(d)(3)(E)(ii) The Administrator Has Fully Approved the Applicable Implementation Plan for the Area Under Section 110(k)

Prior to the enactment of the Clean Air Act Amendments of 1990, Public Law 101–549, Cherokee County was a designated attainment area and had a fully approved attainment area SIP. 40 CFR 52.2120. As stated below, by this action today, EPA is approving Cherokee County's maintenance plan and has found that Cherokee County has met all of the applicable requirements under Section 110 and part D. Based on this, EPA believes that Cherokee County has a fully approved SIP under section 110(k) of the Act.

Section 107(d)(3)(iii) The Administrator Determines That the Improvement in Air Quality is Due to Permanent and Enforceable Reductions in Emissions Resulting From Implementation of the Applicable Implementation Plan and Applicable Federal Air Pollutant Control Regulations and Other Permanent and Enforceable Reductions

The Federal Motor Vehicle Control Program (FMVCP) requirements for lower tail pipe standards have reduced emissions in Cherokee County. In addition, the Federal requirements to reduce the Reid Vapor Pressure (RVP) of gasoline to 9.5 psi went into effect in Cherokee County during the Summer of 1989. The air quality data showing attainment of the standard is for the time period, 1989–1991, when this requirement was in effect. As required for nonattainment areas in the Southeast, an RVP of 7.8 psi went into effect on June 1, 1992, in Cherokee County. This is discussed further under the section on maintenance plans. Therefore, permanent enforceable VOC emissions reductions have been obtained through State and Federal control programs.

Section 107(d)(3)(E)(iv) The Administrator Has Fully Approved a Maintenance Plan for the Area as Meeting the Requirements of Section 175A

South Carolina has submitted a maintenance plan as required in section 175A of the Act. The maintenance plan includes a requirement to assess growth factors on a triennial basis with the contingency to assess on a yearly basis if the projection inventory is exceeded by 10% or more. The projection inventory reflects the allowable emission rate and the expected actual production or activity level. The plan contains a contingency to implement additional control measures such as Control Technique Guideline (CTG) categories within nine (9) months should the area violate the ozone NAAQS. The plan also relies on a RVP of 9.0 psi. A RVP of 7.8 psi—a more stringent standard—went into effect for Cherokee County on June 1, 1992. However, since Cherokee has demonstrated that it can maintain the standard using the less stringent RVP of 9.0, EPA believes that the maintenance plan may be approved. Therefore, based on the maintenance demonstration, EPA plans to propose approval of the 9.0 psi RVP in the near future. Until such approval the 7.8 psi RVP will remain in place during the applicable months. In addition, South Carolina has committed to keep it's monitoring efforts in Cherokee County at the Cowpens National Park intact after redesignation. Therefore, EPA is approving the maintenance plan.

Section 107(d)(3)(E)(v) The State Containing Such Area Has Met All Requirements Applicable to the Area Under Section 110 and Part D

Prior to the CAA, all of South Carolina including Cherokee County, was designated as attainment and was not subject to any requirements of the CAA to date. Since its designation as nonattainment under the amended Act, none of the requirements under section 182(a) have become applicable. Also, the State agrees to meet conformity requirements of section 176(c)(4) once EPA guidance is issued. In addition, a PSD program exists and will apply in Cherokee County upon redesignation to attainment. Therefore, the State has complied with all requirements of section 110 and part D of the Act. In addition, South Carolina has taken an extra step beyond section 110 and part D by implementing RACT fixups statewide even though RACT is not required for South Carolina. Therefore, EPA believes that the State has met all applicable requirements of section 110 and Part D of the Act.

Final Action

EPA is today redesignating Cherokee County to attainment for ozone. This action is being taken without prior proposal because the changes are noncontroversial and EPA anticipates no significant comments on them. The public should be advised that this action will be effective 60 days from the date of this **Federal Register** notice. However, if notice is received within 30 days that someone wishes to submit adverse or critical comments, this action will be withdrawn and two subsequent notices will be published before the

effective date. One notice will withdraw the final action and another will begin a new rulemaking by announcing a proposal of the action and establishing a comment period.

For further information, the reader may consult a Technical Support Document which contains a detailed review of the material submitted. This is available at the EPA address given previously. Interested persons are invited to submit comments on this proposed approval. EPA will consider all comments received within thirty days of the publication of this notice.

Under 5 U.S.C. 605(b), the Administrator certifies that SIP approvals under sections 107, 110, 172 of the Clean Air Act will not have a significant economic impact on a substantial number of small entities. Redesignations, therefore, do not add any additional requirements for small entities. Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of a flexibility analysis for a SIP approval would constitute Federal inquiry into the economic reasonableness of the State actions. The Clean Air Act forbids EPA to base it's actions concerning SIPs on such grounds.

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 16, 1993. This action shall not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).) The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

Nothing in this action shall be construed as permitting or allowing or establishing a precedent for any future request for a redesignation of any nonattainment area. Each request for redesignation of any nonattainment area shall be considered separately in light of specific technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

Under the Regulatory Flexibility Act, 5 U.S.C. 600 *et seq.*, EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. 5 U.S.C. 603 and 604. Alternatively, EPA may certify that the rule will not have a significant impact on a substantial number of small entities. Small entities include small businesses, small not for profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

List of Subjects

40 CFR Part 52

Air pollution control, Carbon monoxide, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

40 CFR Part 81

Air pollution control, National parks, Wilderness areas.

Dated: October 28, 1992.

Patrick M. Tobin,

Acting Regional Administrator.

Chapter I, Title 40 of the *Code of Federal Regulations* is to be amended as follows:

PART 52—[AMENDED]

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401–7671q.

Subpart PP—South Carolina

2. Section 52.2120 is amended by adding paragraph (c)(36) to read as follows:

§ 52.2120 Identification of plan.

* * * * *

(c) * * *

(36) The maintenance plan for Cherokee County submitted by the South Carolina Department of Health and Environmental Control on July 20, 1992, as part of the South Carolina SIP.

(i) Incorporation by reference.

(A) Cherokee County Ozone Attainment Demonstration and Ten Year Maintenance Plan effective June 11, 1992.

(B) Emissions Inventory Projections for Cherokee County effective June 11, 1992.

(ii) Other material.

(A) July 20, 1992 letter from the Department of Health and Environmental Control. Ten Year Maintenance Plan effective June 11, 1992.

(B) Emission Inventory Projections for Cherokee County effective June 11, 1992.

(iii) Other material.

(A) July 20, 1992 letter from the Department of Health and Environmental Control.

PART 81—DESIGNATION OF AREAS FOR AIR QUALITY PLANNING PURPOSES

1. The authority citation for part 81 continues to read as follows:

Authority: 42 U.S.C. 7401–7642.

2. Section 81.341 is amended by revising the attainment status designation table for Ozone to read as follows:

§ 81.341 South Carolina.

* * * * *

South Carolina—Ozone (O_3).

Designated area	Designation		Classification	
	Date[1]	Type	Date[1]	Type
Statewide		Unclassifiable/Attainment		
Abbeville County				
Aiken County				
Allendale County				
Anderson County				
Bamberg County				
Barnwell County				
Beaufort County				
Berkeley County				
Calhoun County				
Charleston County				
Cherokee County	February 16, 1993			
Chester County				
Chesterfield County				
Clarendon County				
Colleton County				
Darlington County				
Dillon County				

Designated area	Designation		Classification	
	Date [1]	Type	Date [1]	Type
Dorchester County				
Edgefield County				
Fairfield County				
Florence County				
Georgetown County				
Greenville County				
Greenwood County				
Hampton County				
Horry County				
Jasper County				
Kershaw County				
Lancaster County				
Laurens County				
Lee County				
Lexington County				
Marion County				
Marlboro County				
McCormick County				
Newberry County				
Oconee County				
Orangeburg County				
Pickens County				
Richland County				
Saluda County				
Spartanburg County				
Sumter County				
Union County				
Williamsburg County				
York County				

[1] This date is November 15, 1990, unless otherwise noted.

* * * * *

[FR Doc. 92–30425 Filed 12–14–92; 8:45 am]
BILLING CODE 6560–50–M

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Part 65

[Docket No. FEMA–7056]

Changes in Flood Elevation Determinations

AGENCY: Federal Insurance Administration, FEMA.

ACTION: Interim rule.

SUMMARY: This interim rule lists communities where modification of the base (100-year) flood elevations is appropriate because of new scientific or technical data. New flood insurance premium rates will be calculated from the modified base (100-year) flood elevations for new buildings and their contents.

DATES: These modified base flood elevations are currently in effect on the dates listed in the table and revise the Flood Insurance Rate Map(s) (FIRMs) in effect prior to this determination for each listed community.

From the date of the second publication of these changes in a newspaper of local circulation, any person has ninety (90) days in which to request through the community that the Administrator reconsider the changes. The modified elevations may be changed during the 90-day period.

ADDRESSES: The modified base flood elevations for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the following table.

FOR FURTHER INFORMATION CONTACT: William R. Locke, Chief, Risk Studies Division, Federal Insurance Administration, 500 C Street, SW., Washington, DC 20472, (202) 646–2766.

SUPPLEMENTARY INFORMATION: The modified base (100-year) flood elevations are not listed for each community in this interim rule. However, the address of the Chief Executive Officer of the community where the modified base flood elevation determinations are available for inspection is provided.

Any request for reconsideration must be based upon knowledge of changed conditions, or upon new scientific or technical data.

The modifications are made pursuant to section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, and with 44 CFR part 65.

For rating purposes, the currently effective community number is shown and must be used for all new policies and renewals.

The modified base (100-year) flood elevations are the basis for the floodplain management measures that the community is required to either adopt or to show evidence of being already in effect in order to qualify or to remain qualified for participation in the National Flood Insurance Program.

These modified elevations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, state or regional entities.

The changes in base flood elevations are in accordance with 44 CFR 65.4.

National Environmental Policy Act

This rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. No environmental impact assessment has been prepared.

Regulatory Flexibility Act

The Federal Insurance Administrator has determined that this rule is exempt from the requirements of the Regulatory Flexibility Act because modified base flood elevations are required by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are required to maintain community eligibility in the National Flood Insurance Program. No

regulatory flexibility analysis has been prepared.

Regulatory Impact Analysis

This rule is not a major rule under Executive Order 12291, February 17, 1981. No regulatory impact analysis has been prepared.

Executive Order 12612, Federalism

This rule involves no policies that have federalism implications under Executive Order 12612, Federalism, dated October 26, 1987.

Executive Order 12778, Civil Justice Reform

This rule meets the applicable standards of section 2(b)(2) of Executive Order 12778.

List of Subjects in 44 CFR Part 65

Flood insurance, Floodplains, Reporting and recordkeeping requirements.

Accordingly, 44 CFR part 65 is amended to read as follows:

PART 65—[AMENDED]

1. The authority citation for part 65 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 65.4 [Amended]

2. The tables published under the authority of § 65.4 are amended as follows:

State and county	Location	Dates and name of newspaper where notice was published	Chief executive officer of community	Effective date of modification	Community No.
California: San Diego	Unincorporated Areas	Nov. 23, 1992, Nov. 30, 1992, *San Diego Union Tribune.*	The Honorable George F. Bailey, Chairman, San Diego County Board of Supervisors, 1600 Pacific Highway, San Diego, California 92101.	Nov. 16, 1992	060284
Colorado: Boulder	City of Longmont	Dec. 9, 1992, Dec. 16, 1992, *Longmont Daily Times.*	The Honorable Fred Wilson, Mayor, City of Longmont, Civic Center Complex, 408 Third Avenue, Longmont, Colorado 80501.	Nov. 23, 1992	080027
Florida: Sarasota	City of Sarasota	Sept. 15, 1992, Sept. 22, 1992, *Sarasota Herald-Tribune.*	The Honorable Jack Gurney, Mayor of the City of Sarasota, P.O. Box 1058, Sarasota, FL 34230.	Aug. 25, 1992	125150 B
Texas: Tarrant	City of Benbrook	Nov. 19, 1992, Nov. 26, 1992, *The Benbrook News.*	The Honorable Jerry Dunn, Mayor, City of Benbrook, 911 Winscott Road, P.O. Box 26569, Benbrook, Texas 76126.	Oct. 27, 1992	480586

(Catalog of Federal Domestic Assistance No. 83.100, "Flood Insurance")

Issued: December 7, 1992.

C.M. "Bud" Schauerte,

Administrator, Federal Insurance Administration.

[FR Doc. 92–30264 Filed 12–14–92; 8:45 am]

BILLING CODE 6718–03–M

44 CFR Part 65

Changes in Flood Elevation Determinations

AGENCY: Federal Insurance Administration, FEMA.

ACTION: Final rule.

SUMMARY: Modified base (100-year) flood elevations are finalized for the communities listed below. These modified elevations will be used to calculate flood insurance premium rates for new buildings and their contents.

EFFECTIVE DATES: The effective dates for these modified base flood elevations are indicated on the following table and revise the Flood Insurance Rate Map(s) (FIRMs) in effect for each listed community prior to this date.

ADDRESSES: The modified base flood elevations for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the following table.

FOR FURTHER INFORMATION CONTACT: William R. Locke, Chief, Risk Studies Division, Federal Insurance Administration, 500 C Street, SW., Washington, DC 20472, (202) 646–2766.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency gives notice of the final determinations of modified base flood elevations for each community listed. These modified elevations have been published in newspapers of local circulation and ninety (90) days have elapsed since that publication. The Administrator has resolved any appeals resulting from this notification.

The modified base (100-year) flood elevations are not listed for each community in this notice. However, this rule includes the address of the Chief Executive Officer of the community where the modified base flood elevation determinations are available for inspection.

The modifications are made pursuant to section 206 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, and with 44 CFR part 65.

For rating purposes, the currently effective community number is shown and must be used for all new policies and renewals.

The modified base (100-year) flood elevations are the basis for the floodplain management measures that the community is required to either adopt or to show evidence of being already in effect in order to qualify or to remain qualified for participation in the National Flood Insurance Program.

These modified elevations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, state or regional entities.

These modified elevations are used to meet the floodplain management requirements of the NFIP and are also used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in these buildings.

The changes in base flood elevations are in accordance with 44 CFR 65.4.

National Environmental Policy Act

This rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. No environmental impact assessment has been prepared.

Regulatory Flexibility Act

The Federal Insurance Administrator has determined that this rule is exempt from the requirements of the Regulatory Flexibility Act because modified base flood elevations are required by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are required to maintain community eligibility in the National Flood Insurance Program. No regulatory flexibility analysis has been prepared.

Regulatory Impact Analysis

This rule is not a major rule under Executive Order 12291, February 17, 1981. No regulatory impact analysis has been prepared.

Executive Order 12612, Federalism

This rule involves no policies that have federalism implications under Executive Order 12612, Federalism, dated October 26, 1987.

Executive Order 12778, Civil Justice Reform

This rule meets the applicable standards of section 2(b)(2) of Executive Order 12778.

List of Subjects in 44 CFR Part 65

Flood insurance, Floodplains, Reporting and recordkeeping requirements.

Accordingly, 44 CFR part 65 is amended to read as follows:

PART 65—[AMENDED]

1. The authority citation for part 65 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367 3 CFR, 1979 Comp., p. 376.

§ 65.4 [Amended]

2. The tables published under the authority of § 65.4 are amended as follows:

State and county	Location	Date and name of newspaper where notice was published	Chief executive officer of community	Effective date of modification	Community No.
Arkansas: Benton (FEMA Docket No. 7038).	City of Centerton	Oct. 28, 1991, Nov. 4, 1991, The Daily Record.	The Honorable Sherman Kinyon, Mayor of the City of Centerton, Benton County, P.O. Box 208, Centerton, Arkansas 72719.	Oct. 18, 1991 ..	050399
California:					
Mendocino	Unincorporated areas (Docket No. 7052).	Sept. 4, 1992, Sept. 11, 1992, Ukiah Daily Journal.	The Honorable Liz Henry, Chairperson, Mendocino County Board of Supervisors, Clerk of the Board, Courthouse, Ukiah, California 95482.	Aug. 25, 1992 .	060183
Riverside	City of Palm Springs (Docket No. 7052).	Aug. 20, 1992, Aug. 27, 1992, The Desert Sun.	The Honorable Lloyd Maryanov, Mayor, City of Palm Springs, P.O. Box 2743, Palm Springs, California 92263.	July 30, 1992 ..	060257
Sacramento	Unincorporated areas (Docket No. 7051).	Aug. 28, 1992, Sept. 4, 1992, Sacramento Bee.	Douglas M. Fraleigh, Director, Sacramento County Department of Public Works, 827 Seventh Street, Room 304, Sacramento, California 95814.	Aug. 7, 1992 ...	060262
Sacramento	Unincorporated areas (Docket No. 7052).	Aug. 19, 1992, Aug. 26, 1992, The Sacramento Bee.	Douglas M. Fraleigh, Director, Sacramento County Department of Public Works, 827 Seventh Street, Room 304, Sacramento, California 95814.	Aug. 10, 1992 .	060262
San Bernardino	City of Loma Linda (Docket No. 7049).	Aug. 20, 1992, Aug. 27, 1992, San Bernardino County Sun.	The Honorable Robert Christman, Mayor, City of Loma Linda, 25541 Barton Road, Loma Linda, California 92354.	July 16, 1992 ..	065042
Louisiana: Plaquemines Parish (FEMA Docket No. 7043).	Unincorporated areas	May 1, 1992, May 8, 1992, Plaquemines Gazette.	The Honorable Luke A. Petrovich, Parish President, Plaquemines Parish Government, P.O. Box 829, Port Sulphur, Louisiana 70083.	April 9, 1992 ...	220139 B&C
Ohio: Medina (FEMA Docket No. 7044).	City of Brunswick	May 14, 1992, May 21, 1992, Brunswick Sun Times.	The Honorable Judith A. Beadell-Rapp, Mayor of the City of Brunswick, Medina County, 4095 Center Road, Brunswick, Ohio 44212.	May 5, 1992 ...	390380 B
Texas:					
Tarrant	City of Colleyville (Docket No. 7052).	Sept. 3, 1992, Sept. 10, 1992, Colleyville News and Times.	The Honorable Richard Newton, Mayor, City of Colleyville, P.O. Box 185, Colleyville, Texas 76034.	Aug. 3, 1992 ...	480590
Dallas	City of Coppell (Docket No. 7051).	Aug. 21, 1992, Aug. 28, 1992, The Citizen's Advocate.	The Honorable Mark Wolfe, Mayor, City of Coppell, P.O. Box 478, 255 Parkway Boulevard, Coppell, Texas 75019.	Aug. 10, 1992 .	480170
Bexar (FEMA Docket No. 7044).	City of San Antonio	May 6, 1992, May 13, 1992, San Antonio Light.	The Honorable Nelson Wolff, Mayor of the City of San Antonio, P.O. Box 839966, San Antonio, Texas 78283–3966.	April 29, 1992 .	480045 B
Virginia: Independent City (FEMA Docket No. 7043).	City of Harrisonburg	Feb. 27, 1992, March 5, 1992, Daily News Record.	Roger D. Baker, Acting Manager of the City of Harrisonburg, 345 South Main Street, Harrisonburg, Virginia 22801.	Feb. 19, 1992 .	510076 B

(Catalog of Federal Domestic Assistance No. 83.100, "Flood Insurance.")

Issued: December 7, 1992.

C. M. "Bud" Schauerte,

Administrator, Federal Insurance Administration.

[FR Doc. 92–30265 Filed 12–14–92; 8:45 am]

BILLING CODE 6718–03–M

44 CFR Part 67

Final Flood Elevation Determinations

AGENCY: Federal Insurance Administration, FEMA.

ACTION: Final rule.

SUMMARY: Base (100-year) flood elevations and modified base (100-year) flood elevations are made final for the communities listed below.

The base (100-year) flood elevations and modified base flood elevations are the basis for the floodplain management measures that each community is required either to adopt or to show evidence of being already in effect in order to qualify or remain qualified for

participation in the National Flood Insurance Program (NFIP).

EFFECTIVE DATES: The date of issuance of the Flood Insurance Rate Map (FIRM) showing base flood elevations and modified base flood elevations for each community. This date may be obtained by contacting the office where the maps are available for inspection as indicated on the table below.

ADDRESSES: The final base flood elevations for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the following table.

FOR FURTHER INFORMATION CONTACT: William R. Locke, Chief, Risk Studies Division, Federal Insurance Administration, 500 C Street, SW., Washington, DC 20472, (202) 646–2766.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA or Agency) gives notice of the final determinations of base flood elevations and modified base flood elevations for each community listed. The proposed base flood elevations and proposed modified base flood elevations were published in newspapers of local circulation and an opportunity for the community or individuals to appeal the proposed determinations to or through the community was provided for a period of ninety (90) days. The proposed base flood elevations and proposed modified base flood elevations were also published in the **Federal Register.**

This final rule is issued in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR part 67.

The Agency has developed criteria for floodplain management in floodprone areas in accordance with 44 CFR part 60.

National Environmental Policy Act

This rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. No environmental impact assessment has been prepared.

Regulatory Flexibility Act

The Federal Insurance Administrator has determined that this rule is exempt from the requirements of the Regulatory Flexibility Act because final or modified base flood elevations are required by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and are required to establish and maintain community eligibility in the National Flood Insurance Program. No regulatory flexibility analysis has been prepared.

Regulatory Impact Analysis

This rule is not a major rule under Executive Order 12291, February 17, 1981. No regulatory impact analysis has been prepared.

Executive Order 12612, Federalism

This rule involves no policies that have federalism implications under Executive Order 12612, Federalism, dated October 26, 1987.

Executive Order 12778, Civil Justice Reform

This rule meets the applicable standards of section 2(b)(2) of Executive Order 12778.

Interested lessees and owners of real property are encouraged to review the proof Flood Insurance Study and Flood Insurance Rate Map available at the address cited below for each community.

The base flood elevations and modified base flood elevations are made final in the communities listed below. Elevations at selected locations in each community are shown.

List of Subjects in 44 CFR Part 67

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

Accordingly, 44 CFR part 67 is amended as follows:

PART 67—[AMENDED]

1. The authority citation for part 67 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.;* Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 67.11 [Amended]

2. The tables published under the authority of § 67.11 are amended as follows:

Source of flooding and location	#Depth in feet above ground. *Elevation in feet (NGVD)
ARKANSAS	
Walnut Ridge (city), Lawrence County (FEMA Docket No. 7050)	
Village Creek:	
Approximately 6,250 feet downstream of West Free Street	*262
Approximately 2,400 feet upstream of U.S. Highway 67	*267
Highland Creek North:	
Entire reach between Northwest Front Street and Village Creek	*266
Highland Creek South:	
Approximately 120 feet upstream of U.S. Highway 412	*267
Just downstream of Northeast Front Street	*268
Maps are available for review at City Hall, 105 Southeast Front Street, Walnut Ridge, Arkansas.	
KANSAS	
Shawnee County (Unincorporated Areas) (FEMA Docket No. 7050)	
Sixmile Creek:	
Just upstream of SW 97th Street	*967
Just downstream of Urish Road	*1018
Just upstream of Urish Road	*1024
Just downstream of SW 69th Street	*1041
Just upstream of 69th Street	*1049
Just downstream of SW 61st Street	*1081
Maps available for inspection at the County Engineer's Office, 3137 SE 29th Street, Topeka, Kansas.	
MAINE	
Pittston (Town), Kennebec County (FEMA Docket No. 7040)	
Eastern River:	
At downstream corporate limits	*13
Approximately 80 feet above State Route 194	*103
Maps available for inspection at the Town Office, State Route 126, Gardiner, Maine.	
Robbinston (Town), Washington County (FEMA Docket No. 7045)	
St. Croix River:	
At Bunker Point	*17
Shoreline at southern most corporate limits	*25
Boyden Lake: Entire shoreline within community	*79
Maps available for inspection at the Robbinston Town Hall, Ridge Road, Robbinston, Maine.	
MASSACHUSETTS	
Abington (Town), Plymouth County (FEMA Docket No. 7040)	
Stream River:	
Approximately 140 feet downstream of Walnut Street	*80
Approximately 100 feet upstream of upstream crossing of Ashland Street	*127
Maps available for inspection at the Abington Town Hall, 33 Randolph Street, Abington, Massachusetts.	
Middlefield (Town), Hampshire County (FEMA Docket No. 7040)	
Middle Branch Westfield River:	
At the downstream County boundary	*778
At the upstream corporate limits	*1,010
West Branch Westfield River:	
At the downstream County boundary	*732
Approximately 820 feet upstream of CONRAIL	*746
Maps available for inspection at the Middlefield Town Hall, Skyline Trail, Middlefield, Massachusetts.	
North Andover (Town), Essex County (FEMA Docket No. 7037)	
Mosquito Brook:	
Approximately .6 mile downstream of Boxford Street	*114
Approximately 65 feet upstream of Chestnut Street	*238
Boston Brook:	

Source of flooding and location	#Depth in feet above ground. *Elevation in feet (NGVD)
At downstream corporate limits	*85
Approximately .7 mile upstream of Hawkins Lane	*107
Maps available for inspection at the Town Hall, 120 Main Street, North Andover, Massachusetts.	

Pepperell (Town), Middlesex County (FEMA Docket No. 7040)

Varnum Brook:	
At confluence with Nashua River	*185
Approximately 65 feet upstream of Hollis Street	*241
Greens Brook:	
At confluence with Varnum Brook	*233
Approximately 140 feet upstream of Elm Street	*255
Maps available for inspection at the Pepperell Town Office, 1 Main Street, Pepperell, Massachusetts.	

MICHIGAN

Evart (City), Osceola County (FEMA Docket No. 7048)

Twin Creek:	
At mouth	*992
About 1950 feet upstream of Fifth Street	*1012
Muskegon River:	
At Main Street	*992
About 2000 feet upstream of Main Street	*993
Maps available for inspection at the City Manager's Office, City Hall, 101 North Main Street, Evart, Michigan.	

MISSOURI

Jennings (City), St. Louis County (FEMA Docket No. 7050)

Maline Creek:	
About 1,650 feet downstream of Halls Ferry Road	*449
About 1,225 feet downstream of Lucas-Hunt Road	*454
About 740 feet upstream of Lucas-Hunt Road	*456
Maps available for inspection at the City Hall, Building Department, 2120 Hord Avenue, Jennings, Missouri.	

St. Louis County (Unincorporated Areas) (FEMA Docket No. 7053)

Maline Creek:	
About 0.80 mile downstream of Halls Ferry Road	*448
About 0.40 mile upstream of Glenn Owen Drive	*466
Black Jack Creek:	
At mouth	*449
Just downstream of Pershall Road	*475
Just upstream of Dunn Road	*492
Just downstream of Redman Avenue	*495
Dellwood Creek:	
At mouth	*460
About 1,970 feet upstream of Clairmont Drive	*487
Halls Ferry Creek:	
At mouth	*471
Just downstream of Old Halls Ferry Road	*474
Maps available for inspection at the Department of Planning, 41 South Central Avenue, Clayton, Missouri.	

NEW HAMPSHIRE

Jaffrey (Town), Cheshire County (FEMA Docket No. 7040)

Contoocook Lake: Entire shoreline within community	*1,013
Mountain Brook Reservoir: Entire shoreline within community	*1,019
Contoocook River:	
At downstream corporate limits	*852
At Contoocook Lake Dam	*1,013
Mountain Brook:	
At Gilmore Pond Road	*1,022
Approximately 100 feet upstream of State Route 124	*1,063
Mead Brook:	
At confluence with Moutain Brook	*1,039
Approximately 100 feet upstream of State Route 124	*1,090
Black Reservoir Outlet Stream:	
Approximately 50 feet downstream of Contoocook Road Bridge	*1,013
Approximately 35 feet upstream of Black Reservoir Dam	*1,087
Maps available for inspection at the Jaffrey Town Hall, 69 Main Street, Jaffrey, New Hampshire 03452.	

Weare (Town), Hillsborough County (FEMA Docket No. 7050)

Piscataquog River:	
At downstream corporate limits	*302
Approximately 100 feet upstream of Reservoir Road	*623
Weare Reservoir: Entire shoreline within community	*657
Hopkinton-Everett Reservoir: Entire shoreline within community	*416
Daniels Lake: Entire shoreline within community	*377
Maps available for inspection at the Weare Town Office, 15 Flanders Memorial Drive, Weare, New Hampshire 03281.	

Webster (Town), Merrimack County (FEMA Docket No. 7050)

Blackwater River:	
At the downstream corporate limits	*360
Approximately 1.7 miles upstream of Clothespin Road	*472
Maps available for inspection at the Town Clerk's Office, R.F.D. #5, Box 325, Webster, New Hampshire.	

NEW YORK

Bainbridge (Village), Chenango County (FEMA Docket No. 7048)

Susquehanna River:	
At downstream corporate limits	*980
At upstream corporate limits	*982
Maps available for inspection at the Bainbridge Village Offices, 33 West Main Street, Bainbridge, New York.	

Champion (Town), Jefferson County (FEMA Docket No. 7050)

Black River:	
Approximately 200 feet downstream of Deferiet Dam	*651
At corporate limits with Village of West Carthage	*689
Maps available for inspection at the Champion Town Clerk's Office, 7 North Main Street, West Carthage, New York 13619.	

Milton (Town), Saratoga County (FEMA Docket No. 7050)

Glowegee Creek:	
At the confluence with Kayaderosseras Creek (upper reach)	*389
Approximately 0.2 mile upstream of Private Dam	*436
Kayaderosseras Creek (lower reach):	
Approximately 0.2 mile downstream of Delaware and Hudson Railroad Bridge	*229
Approximately 0.3 mile upstream of Delaware and Hudson Railroad Bridge	*232
Kayaderosseras Creek (upper reach):	
At the downstream corporate limits	*269
Approximately 200 feet upstream of corporate limits	*523
Maps available for inspection at the Milton Town Hall, Building Department, 503 Guyser Road, Ballston Spa, New York.	

OHIO

Avon (City), Lorain County (FEMA Docket No. 7042)

Mills Creek:	
At mouth	*691
Just downstream of Mills Road	*703
Schwartz Ditch:	
At mouth	*689
About 2450 feet upstream of Williams Court	*696
French Creek:	
Just downstream of State Route 83	*686
Just downstream of Mills Road	*695
Maps available for inspection at the City Hall, 36774 Detroit Road, Avon, Ohio.	

OKLAHOMA

Noble County (Unincorporated Areas) (FEMA Docket No. 7039)

Dry Creek:	
At county boundary	*915
Approximately 1.3 miles upstream of county boundary	*932
North Stillwater Creek:	
At country boundary	*905
Approximately 500 feet upstream of county boundary	*906
Maps available for inspection at the Noble County Courthouse, Perry, Oklahoma.	

Nowata (City), Nowata County (FEMA Docket No. 7053)

Western Branch Creek:	
Approximately 1,000 feet downstream of Choctaw Avenue, at the corporate limits	*677
Approximately 300 feet upstream of U.S. Route 169	*683
At Cherokee Avenue	*686
At Elm Street	*689
Just upstream of Maple Street	*693
Golf Course Tributary:	
At the confluence with Western Branch Creek	*691
At Pecan Street	*701
Approximately 250 feet upstream of Hickory Street	*708
Seneca Street Tributary:	
At the confluence with Western Branch Creek	*692
Just upstream of Seneca Street	*694
Southwest Tributary:	
Just downstream of Galer Street	*686
Approximately 2,000 feet upstream of Galer Street	*695
Maps are available for review at City Hall, 701 East Modoc Street, Nowata, Oklahoma.	

PENNSYLVANIA

Muncy (Borough), Lycoming County (FEMA Docket No. 7048)

West Branch Susquehanna River:	
Approximately 550 feet upstream of State Route 405	*504
Approximately 100 feet upstream of State Route 405	*504
Glade Run:	

Source of flooding and location	#Depth in feet above ground. *Elevation in feet (NGVD)
At confluence with W. Branch Susquehanna River	*504
At downstream side of Penn Street	*505
Maps available for inspection at the Muncy Town Office, 14 North Washington Street, Muncy, Pennsylvania.	
Springfield (Township), Montgomery County (FEMA Docket No. 7048)	
Sandy Run:	
Approximately 100 feet downstream of Valley Green Road	*178
Approximately 125 feet upstream of the upstream corporate limits	*184
Wissahickon Creek:	
At Wissahickon Avenue	*140
At upstream corporate limits	*141
Maps available for inspection at the Springfield Township Manager's Office, Township Building, 1510 Paper Mill Road, Wyndmoor, Pennsylvania.	
TEXAS	
Buda (City), Hays County (FEMA Docket No. 7040)	
Onion Creek:	
Approximately 350 feet downstream of State Route 967	*688
Approximately 0.59 mile upstream of State Route 967	*695
Maps available for inspection at the Buda City Hall, Main Street, Buda, Texas.	
Grand Prairie (City), Dallas, Tarrant, and Ellis Counties (FEMA Docket No. 7027)	
Lynn Creek:	
At the confluence with Lake Joe Pool	*538
Approximately 1.13 miles upstream of the confluence with Lake Joe Pool	*552
West Fork Trinity River:	
Approximately .9 mile upstream of Tarrant-Dallas County boundary	*458
At the Great Southwest Railroad Spur	*461
Lake Joe Pool: Entire shoreline within the community	*538
Bear Creek:	
Approximately 550 feet upstream of Beltline Road	*448
Upstream corporate limit (at Rock Island Road)	*460
Bowman Branch:	
Approximately 600 feet downstream of Arlington Webb Britton Road	*538
At Arlington Webb Britton Road	*538
Cottonwood Creek:	
Approximately 50 feet upstream of the Dallas-Tarrant County boundary	*509
Approximately 150 feet downstream of the upstream corporate limit	*528
South Fork of Cottonwood Creek:	
Approximately 800 feet downstream of the Great Southwest Parkway	*545
Approximately 800 feet upstream of the Great Southwest Parkway	*554
Johnson Creek:	
Approximately 100 feet upstream of Lower Tarrant Road	*449
At the upstream corporate limits	*509
Stream JC–1:	
At the confluence with Johnson Creek	*450
Approximately 1,230 feet upstream of West Tarrant Road	*501
Maps available for inspection at the Department of Public Works, 317 College, Grand Prairie, Texas.	
Westlake (Town), Denton and Tarrant Counties (FEMA Docket No. 7053)	
Higgins Branch:	
At confluence with Kirkwood Branch	*593
Approximately 100 feet upstream of Dove Street	*601
Kirkwood Branch:	
Approximately 100 feet downstream of State Route 114	*580
Approximately 1,825 feet upstream of Dove Street	*629
Marshall Branch:	
Approximately 50 feet downstream of State Route 114	*594
Approximately 275 feet upstream of Turner Lake Dam	*614
Whites Branch:	
Approximatley 0.38 mile downstream of corporate limits	*596
At corporate limits	*607
Stream WB–1:	
At downstream corporate limits	*594
At upstream corporate limits	*596
Kirkwood Branch Tributary:	
At confluence with Kirkwood Branch	*588
Approximately 220 feet downstream of Village Access Drive	*594
Maps available for inspection at Metroplex Engineering Consultants, Inc., 501 South Carroll Road, Denton, Texas.	
Woodcreek (City), Hays County (FEMA Docket No. 7042)	
Cypress Creek:	
Approximately 100' upstream of corporate limits	*907
Approximately 610' upstream from Jacobs Well Road at corporate limits	*937
Maps available for inspection at the Woodcreek City Hall, 17 Wildwood, Woodcreek, Texas.	
U.S. VIRGIN ISLANDS	
Island of St. Thomas (FEMA Docket No. 7039)	
Turpentine Run:	
At confluence with Mangrove Lagoon	*6
Approximately 0.6 mile upstream of Bovoni Road (State Route 30)	*37
Maps available for inspection at the Department of Planning and Natural Resources, Nisky Center, suite 231, #45A Estate Nisky, St. Thomas, Virgin Islands.	
VIRGINIA	
Augusta County (Unincorporated Areas) (FEMA Docket no. 7040)	
Folly Mills Creek:	
Approximately 550 feet downstream of the most downstream crossing of State Route 693	*1,560
Approximately 1,000 feet upstream of the most upstream crossing of State Route 693	*1,590
Maps available for inspection at the Augusta County Government Center, Community Development Office, Lee Highway, Verona, Virginia.	

(Catalog of Federal Domestic Assistance No. 83.100, "Flood Insurance.")

Issued: December 7, 1992.

C.M. "Bud" Schauerte,

Administrator, Federal Insurance Administration.

[FR Doc. 92–30260 Filed 12–14–92; 8:45 am]

BILLING CODE 6718–03–M

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Parts 171, 172, 174 and 177

[Docket Nos. HM–181, and HM–189, Amdt. Nos. 171–111, 172–123, 174–68 and 177–78]

Hazardous Materials Regulations; Editorial Corrections

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Final rule; corrections.

SUMMARY: This document makes certain editorial corrections to a final rule which corrected editorial errors and made minor regulatory changes to the Hazardous Materials Regulations (HMR). This action is necessary to reduce misunderstandings of the HMR. The intended effect is to promote accuracy of the HMR. These amendments are minor editorial changes which will not impose any new requirements on persons subject to the HMR.

EFFECTIVE DATE: October 1, 1992.

FOR FURTHER INFORMATION CONTACT: John Gale or Beth Romo, telephone (202) 366–4488, Office of Hazardous Materials Standards, or Charles Hochman, telephone (202) 366–4545, Office of Hazardous Materials Technology, Research and Special Programs Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION:

Background

A final rule was published on October 1, 1992 under Dockets HM–181 and HM–189 [57 FR 45446] which made editorial and technical corrections to 49 CFR parts 107–180. This document corrects editorial errors in the October 1, 1992 final rule.

The definition for "non-bulk packaging" in § 171.8 is corrected by restoring the quantity limits for liquids as "450 L (119 gallons) or less" and for solids "400 kg (882 pounds) or less." The "non-bulk packaging" definition in the October 1, 1992 final rule does not include the actual quantities of "450 L"

or "400 kg"; therefore, those quantities do not fall in either the "bulk" or "non-bulk" packaging definition. Also, in (3), the water capacity of a receptacle for a gas is revised to read "454 kg or less", in place of "greater than 454 kg (1000 pounds) or less", which is contradictory.

The October 1, 1992 final rule amended certain entries in the § 172.101 Hazardous Materials Table. Item "m." of the amendatory language, for the entry "Carbon monoxide", stated that the Column (8C) reference "302" was revised to read "314, 315", when in fact the Column (8C) reference to be revised was "None". However, RSPA subsequently has determined that the pre-October 1, 1992 entry for Carbon monoxide is correct, and the "None" in Column (8C) should not be revised.

In the § 172.101 Table amendments, item "dd." of the amendatory language added Special Provision B47 in Column (7) for two entries, "Nitrating acid mixtures *with not more than 50 percent nitric acid*" and "Nitrating acid mixtures *with 50 percent or more nitric acid*". This was not correct. Special Provision B47 should apply to "Nitric acid *other than red fuming with more than 70 percent nitric acid*" and "Nitric acid *other than red fuming, with not more than 70 percent nitric acid*". This document amends the entries for nitrating acid mixtures by removing Special Provision B47. For the aforementioned nitric acid entries, Special Provision B47 is added in Column (7).

The section-by-section review in the October 1, 1992 final rule stated that a domestic entry for "vinyl chloride" was being added to the § 172.101 Table, but this addition was inadvertently omitted from the amendments to the Table. A domestic entry for "Vinyl chloride" is added to the Table in this document.

An exception to permit the use of hat shaped or open channel stiffening rings on carbon steel cargo tanks used to transport asphalt and liquid tar was inadvertently omitted in Special Provision B13 in § 172.102. This exception from the circumferential reinforcement requirements of § 178.345–7(d)(5) is added in this document.

This document also clarifies a domestic exception provided for Class 9 placards. The October 1, 1992 final rule amended § 172.504 by adding an exception in paragraph (f)(9) for the display of a Class 9 placard in domestic transportation if a bulk package is marked with the appropriate identification number on an orange panel or a white square-on-point display configuration. RSPA has received several inquiries as to whether this provision precludes the use of the identification numbers on a Class 9 placard. RSPA did not intend to preclude use of the Class 9 placard for display of identification numbers as permitted under § 172.332. Therefore, § 172.504(f)(9) is revised to clarify that a Class 9 placard may be used, but is not required.

The Segregation Table, which appears in §§ 174.81 and 177.848, is editorially revised to add an "O" at the intersection of the row entitled "Oxidizers" and the column entitled "3". This revision was discussed in the section review of the October 1, 1992 final rule, but was not included in the regulatory text amendments of §§ 174.81 and 177.848.

List of Subjects

49 CFR Part 171

Exports, Hazardous materials transportation, Hazardous waste, Imports, Incorporation by reference, Reporting and recordkeeping requirements.

49 CFR Part 172

Hazardous materials transportation, Hazardous waste, Labeling, Packaging and containers, Reporting and recordkeeping requirements.

49 CFR Part 174

Hazardous materials transportation, Radioactive materials, Railroad safety.

49 CFR Part 177

Hazardous materials transportation, Motor carriers, Radioactive materials, Reporting and recordkeeping requirements.

In consideration of the foregoing, 49 CFR chapter I is amended as follows:

PART 171—GENERAL INFORMATION, REGULATIONS, AND DEFINITIONS

1. The authority citation for part 171 continues to read as follows:

Authority: 49 App. U.S.C. 1802, 1803, 1804, 1805, 1808, 1815, 1818; 49 CFR Part 1.

§ 171.8 [Amended]

2. In § 171.8, for the definition "Non-bulk packaging", the following changes are made:

a. In paragraphs (1) and (2), the wording "less than 450 L (119 gallons)" is revised to read "of 450 L (119 gallons) or less".

b. In paragraph (2), the wording "less than 400 kg (882 pounds)" is revised to read "of 400 kg (882 pounds) or less".

c. In paragraph (3), the wording "greater than 454 kg (1000 pounds) or less" is revised to read "of 454 kg (1000 pounds) or less".

PART 172—HAZARDOUS MATERIALS TABLE, SPECIAL PROVISIONS, HAZARDOUS MATERIALS COMMUNICATIONS, EMERGENCY RESPONSE INFORMATION, AND TRAINING REQUIREMENTS

3. The authority citation for part 172 continues to read as follows:

Authority: 49 App. U.S.C. 1803, 1804, 1805, and 1808; 49 CFR part 1, unless otherwise noted.

4. In § 172.101, in the Hazardous Materials Table, the following entry is added in appropriate alphabetical sequence:

§ 172.101 HAZARDOUS MATERIALS TABLE

Symbols	Hazardous materials descriptions and proper shipping names	Hazard class or division	Identification No.	Packing group	Label(s) required (if not excepted)	Special provisions	(8) Packaging authorizations (§ 173.* * *)			(9) Quantity limitations		(10) Vessel stowage requirements	
							Exceptions	Nonbulk packaging	Bulk packaging	Passenger aircraft or rail car	Cargo aircraft only	Vessel stowage	Other stowage provisions
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8A)	(8B)	(8C)	(9A)	(9B)	(10A)	(10B)
•	•	•	•	•	•	•	•	•	•	•	•	•	•

[Add].

§ 172.101 HAZARDOUS MATERIALS TABLE—Continued

Symbols	Hazardous materials descriptions and proper shipping names	Hazard class or division	Identification No.	Packing group	Label(s) required (if not excepted)	Special provisions	(8) Packaging authorizations (§ 173.* * *)			(9) Quantity limitations		(10) Vessel stowage requirements	
							Exceptions	Nonbulk packaging	Bulk packaging	Passenger aircraft or rail car	Cargo aircraft only	Vessel stowage	Other stowage provisions
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8A)	(8B)	(8C)	(9A)	(9B)	(10A)	(10B)
D	Vinyl chloride ..	2.1	NA1086		Flammable gas.	21, B44	306	304	314, 315	Forbidden .	150 kg	B	40

§ 172.101 [Amended]

5. In addition, in the § 172.101 Table, the following changes are made:

a. For the entry "Carbon monoxide", in Column (8B), "314, 315" is revised to read "302" and Column (8C) should continue to read "None".

b. For the entries "Nitrating acid mixtures *with not more than 50 per cent nitric acid*" and "Nitrating acid mixtures *with 50 per cent or more nitric acid*", in Column (7), Special Provision "B47," is removed.

c. For the entries "Nitric acid *other than red fuming with more than 70 percent nitric acid*" and "Nitric acid *other than red fuming, with not more than 70 percent nitric acid*", in Column (7), Special Provision "B47," is added in appropriate alpha-numeric order.

§ 172.102 [Amended]

6. In § 172.102, in paragraph (c)(3), in Special Provision B13, the wording "178.345–7(d)(5), circumferential reinforcements," is added to paragraph b. immediately following "from §§ ".

§ 172.504 [Amended]

7. In § 172.504, in paragraph (f)(9), in the second sentence, the wording "marked on each side and each end with the appropriate identification number displayed on an orange panel or a white-square-on-point display configuration are required by subpart D of this part." is revised to read "marked with the appropriate identification number displayed on a Class 9 placard, an orange panel or a white-square-on-point display configuration as required by subpart D of this part.".

PART 174—CARRIAGE BY RAIL

8. The authority citation for part 174 continues to read as follows:

Authority: 49 App. U.S.C. 1803, 1804, 1808; 49 CFR 1.53(e), 1.53, App. A to part 1.

§ 174.81 [Amended]

9. In § 174.81, in the Segregation Table in paragraph (d), in the entry for "Oxidizers—5.1", the letter "O" is added in the column titled "3".

PART 177—CARRIAGE BY PUBLIC HIGHWAY

10. The authority citation for part 177 continues to read as follows:

Authority: 49 App. U.S.C. 1803, 1804, 1805; 49 CFR part 1.

§ 177.848 [Amended]

11. In § 177.848, in the Segregation Table in paragraph (d), in the entry for "Oxidizers—5.1", the letter "O" is added in the column titled "3".

Issued in Washington, DC, on December 4, 1992, under authority delegated in 49 CFR part 1.

Douglas B. Ham,

Acting Administrator, Research and Special Programs Administration.

[FR Doc. 92–30250 Filed 12–14–92; 8:45 am]

BILLING CODE 4910–60–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 285

[Docket No. 920407–2519]

Atlantic Tuna Fisheries; Bluefin Tuna

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Announcement of an Incidental Catch category quota overage for the 1992 fishing season and adjustment of the 1993 quota.

SUMMARY: NMFS announces that the longline component of the Incidental Catch category fishery for Atlantic bluefin tuna operating south of 36°00′ N. latitude in the Regulatory Area has exceeded its quota for 1992 by 13 metric tons (mt). Therefore, pursuant to Federal regulations for Atlantic tuna fisheries, the 1992 13-mt overage will be subtracted from the 1993 longline Incidental Catch quota of 67 mt. This results in a 1993 longline Incidental Catch category quota for the area south of 36°00′ N. latitude of 54 mt. The intent of this action is to prevent overharvest of the longline Incidental Catch quota established for this fishery for the 1992–93 biennial period.

EFFECTIVE DATES: The quota reduction will be effective from 0001 hours local time January 1, 1993, through December 31, 1993.

FOR FURTHER INFORMATION CONTACT: Richard B. Stone, 301–713–2347.

SUPPLEMENTARY INFORMATION: Regulations promulgated under the authority of the Atlantic Tunas Convention Act (16 U.S.C. 971 *et seq.*) regulating the harvest of Atlantic bluefin tuna by persons and vessels subject to U.S. jurisdiction are found at 50 CFR part 285. Section 285.22(e)(1) provides for a 1992 season quota of 132 mt of Atlantic bluefin tuna to be harvested from the Regulatory Area by longline vessels permitted in the Incidental Catch category, with no more than 104 mt. of that quota harvested in the area south of 36°00′ N. latitude. Section 285.22(e)(2) provides for a 1993 season quota of 85 mt of Atlantic bluefin tuna to be harvested from the Regulatory Area by longline vessels permitted in the Incidental Catch category, with no more than 67 mt of that quota harvested in the area south of 36°00′ N. latitude. If a quota in any category, or as appropriate, subcategory, has been exceeded or has not been reached, the Assistant Administrator for Fisheries, NOAA (Assistant Administrator), is required under § 285.22(h) to subtract the overage from, or add the underage to, that quota for 1993; provided that the total of the 1992 harvest plus the 1993 adjusted quotas and the reserve does not exceed 2,497 mt. The Assistant Administrator is further required to publish any amounts to be subtracted or added and the basis for the quota reductions or increases in the **Federal Register**.

The longline component of the Incidental Catch category fishery for Atlantic bluefin tuna operating south of 36°00′ N. latitude in the Regulatory Area, exceeded its quota for 1992 by 13

mt. Therefore, pursuant to § 285.22(h), the 1992 13-mt overage will be subtracted from the 1993 longline Incidental Catch quota of 67 mt. This action will create a 1993 longline Incidental Catch category quota for the area south of 36°00′ N. latitude of 54 mt. The intent of this action is to prevent overharvest of the longline Incidental Catch quota established for this fishery for the 1992–93 biennial period

Classification

This action is required by 50 CFR 285.22(h) and complies with E.O. 12291.

List of Subjects in 50 CFR Part 285

Fisheries, Penalties, Reporting and recordkeeping requirements, Treaties

Dated: December 9, 1992.

David S. Crestin,

Acting Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 92–30405 Filed 12–14–92; 8:45 am]

BILLING CODE 3510–22–M

Proposed Rules

Federal Register
Vol. 57, No. 241
Tuesday, December 15, 1992

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

Small Business Size Standards; Waiver of the Nonmanufacturer Rule

AGENCY: Small Business Administration.

ACTION: Notice of intent to waive the Nonmanufacturer Rule for photographic film and video cassette records.

SUMMARY: The Small Business Administration (SBA) is considering granting a waiver of the Nonmanufacturer Rule for photographic film and for video cassette recorders. The basis for a waiver of the Nonmanufacturer Rule for these products is that there are no small business manufacturers or processors available to supply these products to the Federal government. The effect of a waiver would be to allow otherwise qualified regular dealers to supply the products of any domestic manufacturer on a Federal contract set aside for small businesses or awarded through the SBA 8(a) Program. The purpose of this notice is to solicit comments and potential source information from interested parties.

DATES: Comments and sources must be submitted on or before December 30, 1992.

ADDRESSES: Robert J. Moffitt, Associate Administrator for Procurement Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416, Tel: (202) 205–6460.

SUPPLEMENTARY INFORMATION: Public Law 100–656, enacted on November 15, 1988, incorporated into the Small Business Act the previously existing regulation that recipients of Federal contracts set aside for small businesses or SBA 8(a) Program procurement must provide the product of a small business manufacturer or processor, if the recipient is other than the actual manufacturer or processor. This requirement is commonly referred to as the Nonmanufacturer Rule. The SBA regulations imposing this requirement are found at 13 CFR 121.906(b) and 121.1106(b). Section 303(h) of the law provides for waiver of this requirement by SBA for any "class of products" for which there are no small business manufacturers or processors in the Federal market. To be considered available to participate in the Federal market on these classes of products, a small business manufacturer must have submitted a proposal for a contract solicitation or received a contract from the Federal government within the last 24 months. The SBA defines "class of products" based on two coding systems. The first is the Office of Management and Budget *Standard Industrial Classification Manual*. The second is the Product and Service Code established by the Federal Procurement Data System.

The Small Business Administration (SBA) is currently processing a request for a waiver of the Nonmanufacturer Rule for photographic film (SIC code 3861, PSC code 6770) and video cassette recorders (SIC code 3651, PSC code 5836) and invites the public to comment or provide information on potential small business sources for these products.

In an effort to identify potential small business sources, the SBA has searched the Procurement Automated Source System (PASS) and *Thomas Register*, and published a notice in the *Commerce Business Daily*. The SBA has also been in touch with procurement staff at several major procuring agencies to request information on potential small business sources. None of these efforts have identified such sources for these products.

Dated: December 2, 1992.

Robert J. Moffitt,

Associate Administrator for Procurement Assistance.

[FR Doc. 92–30376 Filed 12–14–92; 8:45 am]

BILLING CODE 8025–01–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 92–AWP–9]

Proposed Amendment to Tucson, AZ Transition Area and Proposed Establishment of Ryan Field, AZ Transition Area

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to amend the 700 foot above ground level (AGL) transition area at Tucson, AZ. This amendment would clarify the Tucson Transition Area by eliminating the Ryan Field, AZ, Transition Area from the Tucson Transition Area description, and listing Ryan Field as a separate entity. Heretofore, the Ryan Field Transition Area had been published as part of the Tucson Transition Area. A new Standard Instrument Approach Procedure (SIAP), the non-directional beacon/distance measuring equipment (NDB/DME) runway (RWY) 6, has been developed for Ryan Field, Tucson, AZ which necessitates the enlargement of the 700 foot transition area to contain holding pattern airspace for the missed approach portion of the new SIAP.

DATES: Comments must be received on or before February 15, 1993.

ADDRESSES: Send comments on the proposal in triplicate to: Federal Aviation Administration, Attn: Manager, System Management Branch, AWP–530, Docket No. 92–AWP–9, Air Traffic Division, P.O. Box 92007, Worldway Postal Center, Los Angeles, California 90009.

The official docket may be examined in the Office of the Regional Counsel, Western-Pacific Region, Federal Aviation Administration, room 6W14, 15000 Aviation Boulevard, Lawndale, CA.

An informal docket may be examined during normal business hours at the Office of the Manager, System Management Branch, Air Traffic Division at the above address.

FOR FURTHER INFORMATION CONTACT: Gene Enstad, Airspace Specialist, System Management Branch, AWP–530, Air Traffic Division, Western-Pacific

Region, Federal Aviation Administration, 15000 Aviation Boulevard, Lawndale, California 90261; telephone (310) 297–0010.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify the airspace docket number and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with the comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Airspace Docket No. 92–AWP–9." The postcard will be date/time stamped and returned to the commenter. All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of comments received. All comments submitted will be available for examination in the System Management Branch, Air Traffic Division, at 15000 Aviation Boulevard, Lawndale, California 90261, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM's

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Federal Aviation Administration, System Management Branch, P.O. Box 92007, Worldway Postal Center, Los Angeles, California 90009. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRM's should also request a copy of Advisory Circular No. 11–2A which describes the application procedures.

The Proposal

The FAA is considering an amendment to part 71 of the Federal Aviation Regulations (14 CFR part 71) to amend the 700 foot AGL Transition Area at Tucson, AZ. This amendment would clarify the Tucson Transition Area by eliminating the Ryan Field, AZ, Transition Area from the Tucson Transition Area description. Heretofore, the Ryan Field Transition Area had been published as part of the Tucson Transition Area. The FAA proposes to list the airspace designation of the Ryan Field transition area as a separate entity. A new Standard Instrument Approach Procedure (SIAP), the NDB/DME RWY 6, has been developed for Ryan Field, Tucson, AZ which necessitates the enlargement of the 700 foot transition area to contain holding pattern airspace for the missed approach portion of the new SIAP. The coordinates for this Airspace Docket are based on North American Datum 83. Transition areas are published in § 71.181 of FAA Order 7400.7A, dated November 2, 1992, and effective November 27, 1992, which is incorporated by reference in 14 CFR 71.1. The transition areas listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 10034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Aviation safety, Incorporation by reference, Transition areas.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend part 71 of the Federal Aviation Regulations (14 CFR part 71) as follows:

PART 71—DESIGNATION OF FEDERAL AIRWAYS, AREA LOW ROUTES, CONTROLLED AIRSPACE, AND REPORTING POINTS, JET ROUTES, AND AREA HIGH ROUTES

1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. app. 1348(a), 1354(a), 1510; E.O. 10854; 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389; 49 U.S.C. 106(g); 14 CFR 11.69.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.7A, Compilation of Regulations, dated November 2, 1992, and effective November 27, 1992, is amended as follows:

Section 71.181 Designation of Transition Areas

* * * * *

AWP AZ TA Ryan Field, AZ [NEW] (lat. 32°08′29″N, long. 111°10′26″W)
Ryan NDB, AZ (lat. 32°08′18″N, long. 111°09′41″W)

That airspace extending upward from 700 feet above the surface within a 5-mile radius of the Ryan Field Airport and within 8 miles north and 4.6 miles south of the Ryan NDB 252° bearing extending from the 5-mile radius to 18.4 miles southwest of the Ryan NDB.

* * * * *

AWP AZ TA Tucson, AZ [REVISED]
Tucson International Airport, AZ (lat. 32°06′58″N, long. 110°56′28″W)

That airspace extending upward from 700 feet above the surface within a 10-mile radius of the Tucson International Airport, and within 16 miles NE and 13 miles SW of the 138° bearing from lat. 32°07′21″N., long. 110°49′14″W.; extending from the 10-mile radius area to 16 miles SE of lat. 32°07′21″N., long. 110°49′14″W.; and within 1 mile NE and 9 miles SW of a 318° bearing from lat. 32°07′21″N., long. 110°49′14″W.; extending from the 10-mile radius area to 22 miles NW of lat. 32°07′21″N., long. 110°49′14″W.; and within 16 miles NE of the 318° bearing from lat. 32°07′21″N., long. 110°49′14″W.; extending from lat. 32°07′21″N., long. 110°49′14″W.; to 30 miles NW of lat. 32°07′21″N., long. 110°49′14″W.; and that airspace extending upward from 1200 feet above the surface bounded by a line beginning at lat. 32°33′00″N., long. 111°45′02″W.; to lat. 32°33′00″N., long. 110°52′02″W.; thence N via long. 110°52′02″W., to the S boundary of V–94; thence SE via the S boundary of V–94 to long. 110°00′02″W.; thence S to lat. 31°39′00″N., long. 110°00′02″W.; to lat. 31°39′00″N., long. 111°00′02″W.; to lat. 32°00′00″N., long. 111°45′02″W.; to the point of beginning.

* * * * *

Issued in Los Angeles, California, on November 19, 1992.

Richard R. Lien,

Manager, Air Traffic Division, Western-Pacific Region.

[FR Doc. 92–30410 Filed 12–14–92; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Housing—Federal Housing Commissioner

24 CFR Parts 251, 252 and 255

[Docket No. R–92–1589; FR–2951–P–01]

RIN 2502–AF09

GNMA Requests for Full Insurance on Coinsurance Loans

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Proposed rule.

SUMMARY: This rule would revise currently applicable multifamily and health facility coinsurance regulations to eliminate the requirement that the Government National Mortgage Association (GNMA), in every case, first attempt to assign issuer-servicer responsibility on current coinsured mortgages held by a defaulting lender-issuer before requesting full insurance endorsement by the Federal Housing Administration (FHA). The purpose of the rule is to eliminate a current regulatory requirement which has proved to be time-consuming and, in most cases, unnecessary.

DATES: Comments must be submitted on or before February 16, 1993.

ADDRESSES: Interested persons are invited to submit comments regarding this Notice to the Office of General Counsel, Rules Docket Clerk, room 10276, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410. Communication should refer to the above docket number and title. Facsimile (FAX) are not acceptable. A copy of each communication submitted will be available for public inspection and copying on weekdays between 7:30 a.m. and 5:30 p.m. at the above address.

FOR FURTHER INFORMATION CONTACT: Donald A. Kaplan, Director, Office of Multifamily Housing Management, room 6160, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410, voice (202) 708–3730, TDD (202) 708–4594. (These are not toll-free numbers.)

SUPPLEMENTARY INFORMATION: The Department's former regulations concerning GNMA's right to assignment of coinsured mortgages were found at 24 CFR 251.827 (Multifamily Coinsurance—New Construction and Substantial Rehabilitation), § 252.827 (Coinsurance of Nursing Homes and Related Facilities), and § 255.827 (Coinsurance of Mortgages Covering Existing Multifamily Projects), before their recent removal as part of the termination of the Coinsurance program. These regulations read as follows:

Section 251.827 [252.827 or 255.827] GNMA right to assignment.

If the lender-issuer defaults on its obligations under the GNMA Mortgage-backed Securities Program, GNMA will have the right, notwithstanding the requirements of § 251.106 [252.106 or 255.106], to cause all Coinsured Mortgages held in GNMA pools by the defaulting coinsuring lender-issuer to be assigned to another GNMA-approved coinsuring lender-issuer or to itself.

(a)(1) For any Coinsured Mortgage that is not in default and is held by a defaulting lender-issuer, BNMA will first attempt to have the Mortgage assigned to another eligible coinsuring lender by soliciting offers to assume the defaulting lender-issuer's rights and obligations under the Mortgage from those eligible coinsuring lenders that are indicated on a periodically updated listing furnished to GNMA by the Commissioner and that are also GNMA issuers.

(2) If GNMA rejects all offers or no offers are received, GNMA will have the right to perfect an assignment of the Mortgage to itself.

(b) For any Coinsured Mortgage that is in default and held by a defaulting lender-issuer, GNMA will have the right to perfect an assignment of the Coinsured Mortgage directly to itself before extinguishing the Mortgage by completion of foreclosure action or acquisition of title by deed-in-lieu of foreclosure.

(c) GNMA, as assignee, will give the Commissioner written notice within 30 days after taking a Mortgage by assignment in accordance with this section, in order to allow an appropriate endorsement and necessary changes in the Commissioner's records.

(d) The Commissioner will endorse any Mortgage assigned to GNMA as provided by this section for full insurance effective as of the date of assignment in accordance with the appropriate provisions of 24 CFR part 221 [232 or 207]. Any future claim by GNMA or any assignment of the fully insured Mortgage will be governed by the appropriate provisions of 24 CFR part 221 [232 or 207], except that any payment will be made in cash instead of debentures.

On October 10, 1990, a final rule was published (55 FR 41312) terminating the FHA multifamily coinsurance programs and revising parts 251, 252 and 255. As a result of the final rule, parts 251, 252 and 255 consist of a single provision dealing with the program phase-out process. However, while the former rule's provisions are no longer included in the Code of Federal Regulations, those regulations in effect before November 12, 1990 continue to govern the rights and obligations of mortgagors, coinsuring lenders and HUD in existence before the termination of the coinsurance programs. The effect of this rule would be to revise those regulations as they relate to the handling of mortgage assignments to GNMA.

In lieu of the above-quoted paragraphs (a)(1) and (a)(2), the rule would provide that "For any Coinsured Mortgage that is not in default and is held by a defaulting lender-issuer, GNMA will have the right to perfect an assignment of the mortgage to itself. However, before exercising this right, GNMA will attempt to have the Mortgage assigned to another eligible coinsuring lender (unless it determines, with the agreement of the Commissioner, that the attempt would prove ineffectual because of market or other conditions). The assignment will be attempted by soliciting offers to assume the defaulting lender-issuer's rights and obligations under the Mortgage from those eligible coinsuring lenders that are also GNMA issuers and that are indicated on a periodically updated listing furnished to GNMA by the Commissioner."

Given the facts that (a) the authority to coinsure mortgages has been terminated; (b) for the most part, no market exists for the purchase of coinsurance servicing rights; and (c) none of the few remaining approved coinsuring lenders has shown any interest to date in assuming additional coinsuring risk by assignment of loans from GNMA, implementation of the regulatory requirement earlier set forth in paragraphs (a)(1) and (a)(2) has proved to be a time-consuming, burdensome and fruitless process. Therefore, this rule proposes to amend parts 251, 252 and 255 to eliminate the requirement that GNMA, in every case, first attempt to assign issuer-servicer responsibility on current coinsured mortgages before perfecting assignment of the Coinsured Mortgage to itself and requesting full insurance endorsement by FHA.

Procedural Matters

This rule does not constitute a "major rule" as that term is defined in section 1(d) of the Executive order 12291 on Federal Regulations issued by the President on February 17, 1981. An analysis of the rule indicates that it does not (1) have an annual effect on the economy of $100 million or more; (2)

cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) have a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

In accordance with 5 U.S.C. 605(b) (the Regulatory Flexibility Act), the undersigned hereby certifies that this rule does not have a significant economic impact on a substantial number of small entities. This rule is procedural in nature. It effects no substantive changes in HUD programs or policies.

This rule was listed as item number 1407 in the Department's Semiannual Agenda of Regulations published on November 3, 1992 (57 FR 51392, 51415) under Executive order 12291 and the Regulatory Flexibility Act.

Executive Order 12612, Federalism

The General Counsel, as the Designated Official under section 6(a) of Executive order 12612, Federalism, has determined that the policies contained in this rule will not have Federalism implications and, thus, are not subject to review under the Order. No programmatic or policy changes would result from this rule's promulgation which would affect existing relationships between the Federal Government and State and local governments.

Executive Order 12606, The Family

The General Counsel, as the Designated Official under Executive order 12606, The Family, has determined that this rule does not have potential for significant impact on family formation, maintenance, and general well-being, and, thus, is not subject to review under the Order. The rule is procedural in nature and no significant change in existing HUD policies or programs impacting on the family will result from promulgation of this rule.

An environmental assessment is unnecessary, since internal administrative procedures whose content does not constitute a development decision affecting the physical condition of specific project areas or building sites is categorically excluded from the Department's National Environmental Policy Act procedures under 24 CFR 50.20(k).

List of Subjects

24 CFR part 251

Low and moderate income housing, Mortgage insurance, Reporting and recordkeeping requirements.

24 CFR part 252

Health facilities, Loan programs—housing and community development, Loan programs—health, Mortgage insurance, Reporting and recordkeeping requirements, Nursing homes.

24 CFR part 255

Low and moderate income housing, Mortgage insurance, Reporting and recordkeeping requirements.

Accordingly, 24 CFR parts 251, 252 and 255 would be amended to read as follows:

PART 251—COINSURANCE FOR THE CONSTRUCTION OR SUBSTANTIAL REHABILITATION OF MULTIFAMILY HOUSING PROJECTS

1. The authority citation for 24 CFR part 251 would be revised to read as follows:

Authority: 12 U.S.C. 1715b, 1715z–9 (42 U.S.C. 3535(d)).

2. Part 251 would be amended by adding the following new § 251.2, to read as follows:

§ 251.2 GNMA right to assignment.

If the lender-issuer defaults on its obligations under the GNMA Mortgage-Backed Securities Program, GNMA will have the right, notwithstanding the requirements of HUD regulations on the assignment of and participation in coinsured mortgages which were in effect before November 12, 1990, to cause all Coinsured Mortgages held in GNMA pools by the defaulting coinsuring lender-issuer to be assigned to another GNMA-approved coinsuring lender-issuer, or to GNMA itself.

(a) For any Coinsured Mortgage that is not in default and is held by a defaulting lender-issuer, GNMA will have the right to perfect an assignment of the mortgage to itself. However, before exercising this right, GNMA will attempt to have the Mortgage assigned to another eligible coinsuring lender (unless GNMA determines, with the agreement of the Commissioner, that the attempt would prove ineffectual because of market conditions or other factors). This attempt will be undertaken by soliciting offers to assume the defaulting lender-issuer's rights and obligations under the Mortgage from those eligible coinsuring lenders that are also GNMA issuers and that are indicated on a periodically updated listing furnished to GNMA by the Commissioner.

(b) For any Coinsured Mortgage that is in default and held by a defaulting lender-issuer, GNMA will have the right to perfect an assignment of the Coinsured Mortgage directly to itself before extinguishing the Mortgage by completion of foreclosure action or acquisition of title by deed-in-lieu of foreclosure.

(c) GNMA, as assignee, will give the Commissioner written notice, within 30 days after taking a Mortgage by assignment in accordance with this section, in order to allow an appropriate endorsement and necessary changes in the Commissioner's records.

(d) The Commissioner will endorse any Mortgage assigned to GNMA as provided by this section for full insurance, effective as of the date of assignment in accordance with the appropriate provisions of 24 CFR part 221. Any future claim by GNMA, or any assignment of the fully insured Mortgage, will be governed by the appropriate provisions of 24 CFR part 221, except that any payment will be made in cash instead of debentures.

PART 252—COINSURANCE OF MORTGAGES COVERING NURSING HOMES, INTERMEDIATE CARE FACILITIES AND BOARD AND CARE HOMES

3. The authority citation for 24 CFR part 252 would be revised to read as follows:

Authority: 12 U.S.C. 1715b, 1715z–9; 42 U.S.C. 3535(d).

4. Part 252 would be amended by adding the following new § 252.2, to read as follows:

§ 252.2 GNMA right to assignment.

If the lender-issuer defaults on its obligations under the GNMA Mortgage-Backed Securities Program, GNMA will have the right, notwithstanding the requirements of HUD regulations on the assignment of and participation in coinsured mortgage which were in effect before November 12, 1990, to cause all Coinsured Mortgages held in GNMA pools by the defaulting coinsuring lender-issuer to be assigned to another GNMA-approved coinsuring lender-issuer, or to GNMA itself.

(a) For any Coinsured Mortgage that is not in default and is held by a defaulting lender-issuer, GNMA will have the right to perfect an assignment of the mortgage to itself. However, before exercising this right, GNMA will attempt to have the Mortgage assigned to another eligible coinsuring lender (unless GNMA determines, with the

agreement of the Commissioner, that the attempt would prove ineffectual because of market conditions or other factors). This attempt will be undertaken by soliciting offers to assume the defaulting lender-issurer's rights and obligations under the Mortgage from those eligible coinsuring lenders that are also GNMA issuers and that are indicated on a periodically updated listing furnished to GNMA by the Commissioner.

(b) For any Coinsured Mortgage that is in default and held by a defaulting lender-issuer, GNMA will have the right to perfect an assignment of the Coinsured Mortgage directly to itself before extinguishing the Mortgage by completion of foreclosure action or acquisition of title by deed-in-lieu of foreclosure.

(c) GNMA, as assignee, will give the Commissioner written notice, within 30 days after taking a Mortgage by assignment in accordance with this section, in order to allow an appropriate endorsement and necessary changes in the Commissioner's records.

(d) The Commissioner will endorse any Mortgage assigned to GNMA as provided by this section for full insurance, effective as of the date of assignment in accordance with the appropriate provisions of 24 CFR part 232. Any future claim by GNMA, or any assignment of the fully insured Mortgage, will be governed by the appropriate provisions of 24 CFR part 232, except that any payment will be made in cash instead of debentures.

PART 255—COINSURANCE FOR THE PURCHASE OR REFINANCING OF EXISTING MULTIFAMILY HOUSING PROJECTS

5. The authority citation for 24 CFR part 255 would be revised to read as follows:

Authority: 12 U.S.C. 1715b, 1715z–9 (42 U.S.C. 3535(d).

6. Part 255 would be amended by adding the following new § 255.2, to read as follows:

§ 255.2 GNMA right to assignment.

If the lender-issuer defaults on its obligations under the GNMA Mortgage-Backed Securities Program, GNMA will have the right, notwithstanding the requirements of HUD regulations on the assignment of and participation in coinsured mortgages which were in effect before November 12, 1990, to cause all Coinsured Mortgages held in GNMA pools by the defaulting coinsuring lender-issuer to be assigned to another GNMA-approved coinsuring lender-issuer, or to GNMA itself.

(a) For any Coinsured Mortgage that is not in default and is held by a defaulting lender-issuer, GNMA will have the right to perfect an assignment of the mortgage to itself. However, before exercising this right, GNMA will attempt to have the Mortgage assigned to another eligible coinsuring lender (unless GNMA determines, with the agreement of the Commissioner, that the attempt would prove ineffectual because of market conditions or other factors). This attempt will be undertaken by soliciting offers to assume the defaulting lender-issuer's rights and obligations under the Mortgage from those eligible coinsuring lenders that are also GNMA issuers and that are indicated on a periodically updated listing furnished to GNMA by the Commissioner.

(b) For any Coinsured Mortgage that is in default and held by a defaulting lender-issuer, GNMA will have the right to perfect an assignment of the Coinsured Mortgage directly to itself before extinguishing the Mortgage by completion of foreclosure action or acquisition of title by deed-in-lieu of foreclosure.

(c) GNMA, as assignee, will give the Commissioner written notice, within 30 days after taking a Mortgage by assignment in accordance with this section, in order to allow an appropriate endorsement and necessary changes in the Commissioner's records.

(d) The Commissioner will endorse any Mortgage assigned to GNMA as provided by this section for full insurance, effective as of the date of assignment in accordance with the appropriate provisions of 24 CFR part 207. Any future claim by GNMA, or any assignment of the fully insured Mortgage, will be governed by the appropriate provisions of 24 CFR part 207, except that any payment will be made in cash instead of debentures.

Dated: December 9, 1992.

Arthur J. Hill,

Assistant Secretary for Housing—Federal Housing Commissioner.

[FR Doc. 92–30351 Filed 12–14–92; 8:45 am]

BILLING CODE 4210–27–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Public and Indian Housing

24 CFR Part 905

[Docket No. R–92–1619; FR–3228–P–01]

RIN 2577–AB11

Indian Housing: Revisions to Lease and Grievance Procedures

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Proposed rule.

SUMMARY: This rule proposes to revise the Indian housing regulations concerning required lease provisions and grievance procedures for residents of Indian housing. The changes would facilitate eviction of tenants who are involved in criminal activity that threatens the health, safety, or right to peaceful enjoyment of other tenants or who are involved in drug-related criminal activity, be permitting use of an expedited grievance procedure or reliance upon court actions without first conducting a grievance procedure.

DATES: Comments must be submitted by February 16, 1993.

ADDRESSES: Interested persons are invited to submit comments regarding this rule to the Office of the General Counsel, Rules Docket Clerk, room 10276, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410–0500. Comment should refer to the above docket number and title. Facsimile (FAX) comments are not acceptable. A copy of each communication submitted will be available for public inspection and copying during regular business hours (7:30 a.m. to 5:30 p.m. Eastern Time) at the above address.

FOR FURTHER INFORMATION CONTACT: Dominic Nessi, Director, Office of Indian Programs, room 4140, Department of Housing and Urban Development, Washington, DC 20410–5000; telephone (202) 708–1015 (voice) or (202) 708–0850 (TDD). (These are not toll-free telephone numbers.)

SUPPLEMENTARY INFORMATION:

I. Paper Reduction Act Statement

The information collection requirements contained in this rule have been submitted to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501–3520).

Public reporting burden for the collection of information requirements

contained in this rule are estimated to include the time for reviewing the instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Information on the estimated public reporting burden is provided in paragraph III. H. of this Preamble. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Department of Housing and Urban Development, Rules Docket Clerk, at the address stated above; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for HUD, Washington, DC 20503.

III. Background

Changes were made to the statutory provisions governing leases and grievance procedures in Indian housing by sections 503, 504 and 505 of the Cranston-Gonzalez National Affordable Housing Act (NAHA), 42 U.S.C. 1437d note, which require notice and comment rulemaking. Proposed and final rules were issued concerning these statutory provisions as they applied to the public housing program (amending 24 CFR part 966), but those rules did not cover the Indian housing program. Consequently, this separate rule is now being published with respect to those statutory changes as they affect the Indian housing program.

Before the enactment of NAHA, section 6(k) of the United States Housing Act of 1937 permitted an Indian Housing Authority (IHA) to exclude from its administrative grievance procedure actions to evict tenants if the jurisdiction required a court hearing that provided the basic elements of due process. The current rule, § 905.340(a)(2), reflects that provision.

However, NAHA places greater emphasis on permitting IHAs to evict tenants quickly and easily if they are involved in criminal activity that is drug-related or threatens the health, safety or peaceful enjoyment of the premises by other tenants or IHA employees. It makes two changes to the IHA's grievance procedures. It revises the provision that has permitted the exclusion from the IHA's grievance procedure of any eviction that would be the subject of a local court proceeding affording due process, as determined by the Secretary. Now only evictions that involve the specified types of criminal activity maybe excluded from the IHA's grievance procedure. NAHA also authorizes, for the first time, an expedited grievance procedure to be established by an IHA, to be used in evictions involving the specified types of criminal activity.

NAHA also revises the provision regarding the leases used in Indian housing, to require that criminal activity as described above engaged in by a tenant, a member of the tenant's household, or a guest of the tenant, is grounds for termination of tenancy. It also requires that the lease provide that any notice of termination of tenancy or notice of eviction must inform the tenant of a right to examine relevant documents, records, or regulations directly related to the termination or eviction before any hearing or trial on the matter.

The rule implementing these changes in the public housing program (published at 56 FR 51560, October 11, 1991) included other changes, as well. This rule simply modifies § 905.340 to add one more provision to the required elements of the lease, to add a provision permitting an expedited grievance procedure, and to modify the situation under which the IHA could omit the grievance procedure and proceed directly to court to terminate tenancy and evict a tenant.

III. Findings and Certifications

A. Impact on the Economy

This rule does not constitute a "major rule" as that term is defined in section 1(b) of the Executive Order on Federal Regulations issued by the President on February 17, 1981. An analysis of the rule indicates that it does not (1) have an annual effect on the economy of $100 million or more; (2) cause a major increase in costs or prices for consumers, individual industries, federal, State, or local government agencies, or geographic regions; or (3) have a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

B. Environmental Review

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50 that implement section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332. The Finding of No Significant Impact is available for public inspection and copying between 7:30 a.m. and 5:30 p.m. weekdays in the Office of the Rules Docket Clerk, room 10276, 451 Seventh Street, SW., Washington, DC 20410–0500.

C. Federalism Impact

The General Counsel, as the Designated Official under section 6(a) of Executive order 12612, Federalism, has determined that the policies contained in this rule will not have substantial direct effects on States or their political subdivisions, or the relationship between the federal government and the States, or on the distribution of power and responsibilities among the various levels of government. This rule merely conforms the existing rule on the subject of Indian housing leases and grievance procedures to the governing statute, as amended. As a result, the rule is not subject to review under the order.

D. Impact on the Family

The General Counsel, as the Designated Official under Executive order 12606, The Family, has determined that this rule does not have potential for significant impact on family formation, maintenance, and general well-being, and, thus, is not subject to review under the order. The rule will simply buttress the efforts of Indian Housing Authorities to keep their housing free of criminal activity by enforcing provisions of the law making drug-related and other serious criminal activity on or near the premises clearly actionable.

E. Impact on Small Entities

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this rule before publication and by approving it certifies that this rule does not have a significant economic impact on a substantial number of small entities. The rule is limited to specifying the procedures for enforcing lease provisions concerning criminal activity.

F. "Takings" Assessment

The General Counsel, as the Designated Official under Executive Order 12630, Government Actions and Interference with Constitutionally Protected Property Rights, has determined that this rule does not have "takings implications" as defined in HUD's "Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings." The Department does not regard the effects of this rule on private property rights as "effectively denying economically viable use of any distinct legally protected property interest of [a property owner], or result in a permanent or temporary physical occupation, invasion, or deprivation."

The proposed rule would merely prescribe, pursuant to statute, the changes in lease provisions and grievance procedures to be used by Indian housing authorities that receive assistance from HUD under the United States Housing Act of 1937.

G. Regulatory Agenda

This rule was listed as item 1497 in the Department's Semiannual Agenda of Regulations published on November 3, 1992 (57 FR 51392, 51435) in accordance with Executive order 12291 and the Regulatory Flexibility Act.

H. Public Reporting Burden

The Department has determined that the following provisions contain information collection requirements and estimates the public reporting burden as follows:

ANNUAL REPORTING BURDEN
[Indian Lease and Grievance Procedure]

Description of information collection	No. of respondents	No. of responses/respondent	Total annual response	Hours per response	Total annual hours
Adoption of expedited grievance procedure	190	1	190	5	950
Development of new lease: 905.340(b)(5)	190	1	190	10	1,900
Obtaining tenant signatures on new lease: 905.340(b)	22,800	1	190	.5	11,400
Recordkeeping	22,800	1	22,800	.5	3,420
Total					17,670

I. Catalog

The Catalog of Domestic Assistance numbers for the programs affected by this rule are 14.850 and 14.851.

List of Subjects in 24 CFR Part 905

Grant programs: Indians, Low and moderate income housing, Homeownership, Public housing.

Accordingly, part 905 of title 24 of the Code of Federal Regulations is proposed to be amended as follows:

PART 905—INDIAN HOUSING PROGRAMS

1. The authority citation for part 905 would continue to read as follows:

Authority: 25 U.S.C. 450e(b); 42 U.S.C. 1437aa, 1437bb, 1437cc, 1437ee and 3535(d).

2. Section 905.340 would be revised to read as follows:

§ 905.340 Grievance procedure and leases.

(a) *Grievance procedures.*

(1) *General.* Each IHA shall adopt and promulgate grievance procedures that are appropriate to local circumstances. These procedures shall comply with the Indian Civil Rights Act, if applicable, and section 6(k) of the Act, as applicable, and shall assure that tenants and homebuyers will:

(i) Be advised of the specific grounds of any proposed adverse action by the IHA;

(ii) Have an opportunity for a hearing before an impartial party upon timely request;

(iii) Have a reasonable opportunity to examine any documents, records, or regulations related to the proposed action before the hearing (or trial in court);

(iv) Be entitled to be represented by another person of their choice at any hearing;

(v) Be entitled to ask questions of witnesses and have others make statements on their behalf; and

(vi) Be entitled to receive a written decision by the IHA on the proposed action.

(2) *Expedited grievance procedure.* An IHA may establish an expedited grievance for any grievance concerning a termination of tenancy or eviction that involves:

(i) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the Indian housing development by other residents or employees of the IHA, or

(ii) Any drug-related criminal activity on or near the premises.

(3) *Exclusion of certain grievances.* (i) *General.* An IHA may pursue termination of tenancy or eviction without offering a grievance procedure where the termination or eviction is based on one of the grounds stated in paragraph (a)(2) of this section if applicable Tribal or State law requires that, before eviction, a tenant (including a homebuyer under a homeownership agreement) be given a hearing in court, if HUD has determined that the Tribal or State procedures provide the basic elements of due process.

(ii) *Basic elements of due process.* The elements of due process against which the jurisdiction's procedures are measured by HUD are the following:

(A) Adequate notice to the tenant of the grounds for terminating the tenancy and for eviction;

(B) Right of the tenant to be represented by counsel;

(C) Opportunity for the tenant to refute the evidence presented by the IHA, including the right to confront and cross-examine witnesses and to present any affirmative legal or equitable defense that the tenant might have; and

(D) A decision on the merits.

(4) *Notice to post office of certain evictions.* When an IHA evicts an individual or family from a dwelling unit for engaging in criminal activity, including drug-related criminal activity, the IHA shall notify the local post office serving that dwelling unit that the evicted individual or family is no longer residing in the dwelling unit (so that the post office will terminate delivery of mail for such persons at the unit, and that such persons will not return to the unit to pick up mail).

(5) *Notice of procedures.* A copy of the grievance procedures shall be posted prominently in the IHA office, and shall be provided to any tenant, homebuyer, or applicant upon request.

(b) *Leases.* Each IHA shall use leases that:

(1) Do not contain unreasonable terms and conditions;

(2) Obligate the IHA to maintain the project in a decent, safe, and sanitary condition;

(3) Require the IHA to give adequate written notice of termination of the lease which shall not be less than—

(i) A reasonable time, but not to exceed 30 days, when the health or safety of other tenants or IHA employees is threatened;

(ii) Fourteen days in the case of nonpayment of rent; and

(iii) Thirty days in any other case;

(4) Require that the IHA may not terminate the tenancy except for serious or repeated violation of the terms or conditions of the lease or for other good cause;

(5) Provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or near the premises, engaged in by an Indian

housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy. For purposes of this section, the term "drug-related criminal activity" means the illegal manufacture, sale, distribution, use, or possession with intent to manufacture, sell, distribute, or use, of a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)); and

(6) Specify that with respect to any notice of termination of tenancy or eviction, notwithstanding any applicable Tribal or State law, an Indian housing tenant shall be informed of the opportunity, before any hearing or trial, to examine any relevant documents, records, or regulations directly related to the termination or eviction.

Dated: December 9, 1992.

Joseph G. Schiff,

Assistant Secretary for Public and Indian Housing.

[FR Doc. 92–30352 Filed 12–14–92; 8:45 am]

BILLING CODE 4210–33–M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[FI–25–92]

RIN 1545–AQ70

Qualified Accelerated Death Benefits Under Life Insurance Contracts

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document provides proposed regulations relating to the definition of a life insurance contract for federal tax purposes and to the federal income tax treatment of amounts received as qualified accelerated death benefits. These proposed regulations are necessary to provide guidance to insurance companies and their policyholders.

DATES: Written comments, requests to speak, and outlines of oral arguments to be presented at the hearing scheduled for March 19, 1993, at 10 a.m. in the Internal Revenue Service Auditorium, must be received by February 26, 1993. See notice of hearing published elsewhere in this issue of the **Federal Register.**

ADDRESSES: Send submissions to: Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Attention: CC:CORP:T:R (FI–25–92), room 5228, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Ann H. Logan, 202–622–3970 (not a toll-free number). Concerning the hearing, Mike Slaughter of the Regulations Unit, 202–622–7190 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document sets forth proposed amendments to the Income Tax Regulations (26 CFR part 1) under sections 101, 7702, and 7702A of the Internal Revenue Code (Code). The proposed rules relate to the definition of a life insurance contract under section 7702 of the Internal Revenue Code, to the treatment of a life insurance contract under section 7702A, and to the federal income tax treatment of amounts received as qualified accelerated death benefits under section 101. The proposed regulations reflect the addition of section 7702 to the Code by section 221(a) of the Tax Reform Act of 1984, Public Law 98–369, and the addition of section 7702A to the Code by section 5012 of the Technical and Miscellaneous Revenue Act of 1988, Public Law 100–647.

Purpose of Regulations

The proposed regulations provide insurers with the standards needed to design and market insurance contracts that provide both death benefits and morbidity benefits without subjecting policyholders to taxation on the inside build-up of the life insurance contracts.

In recognition of the needs of individuals who become terminally ill, the proposed regulations also allow the payment of benefits prior to death without any income tax liability to the recipient if death is expected to occur within 12 months.

For insurance contracts that, prior to July 1, 1993, provide for a benefit or loan for terminally ill individuals or a morbidity benefit, the proposed regulations provide transition rules that prevent the benefit or loan from resulting in adverse federal tax consequences to the policyholders and avoid the reporting and withholding requirements that would be imposed upon the insurers if the contracts were to fail to qualify as life insurance contracts. *See* Rev. Rul. 91–17, 1991–1 C.B. 190.

Summary of Relevant Statutory Provisions

Section 7702 defines a "life insurance contract" as any contract that is a life insurance contract under applicable law, but only if the contract either (1) meets the cash value accumulation test of section 7702(b), or (2) meets the guideline premium requirements of section 7702(c) and falls within the cash value corridor of section 7702(d).

The cash value accumulation test of section 7702(b) requires that, by the terms of the contract, the cash surrender value of the contract may not at any time exceed the net single premium that would have to be paid at that time to fund the future benefits under the contract. "Cash surrender value" for purposes of section 7702 is defined in section 7702(f)(2)(A) as the cash value of the contract determined without regard to any surrender charge, policy loan, or reasonable termination dividends. The "net single premium" must be determined using the assumptions, computational rules, definitions, and special rules contained in section 7702.

The guideline premium limitation of section 7702(c) provides that the premiums paid under the contract at any time must not exceed the greater of the guideline single premium or the sum of the guideline level premiums to that date. Contracts qualifying as life insurance under the guideline premium test also must satisfy the cash value corridor of section 7702(d). The corridor specifies a minimum ratio of death benefits to cash surrender values.

Section 7702(f)(7) provides for adjustments in determinations made under section 7702 if there is a change in the benefits under (or in other terms of) the contract which was not reflected in any previous determination or adjustment. A reduction in death benefits is an adjustment event under section 7702(f)(7). Qualification as a life insurance contract after an adjustment event requires redetermination of values under the contract, including the net single premium, the guideline premium limitation, and the cash value corridor, depending on the test under which the contract qualifies as life insurance.

Section 7702(g) governs the federal income tax treatment of a life insurance contract under applicable law that fails to meet the definition of a life insurance contract under section 7702(a), either at inception or at a later date. In general, under section 7702(g)(1)(A), the "income on the contract" is treated as ordinary income that is received or accrued annually by the policyholder.

Section 7702A(a) defines a modified endowment contract as a life insurance contract meeting the requirements of section 7702 which is entered into on or after June 21, 1988 and which fails to meet the 7-pay test of section 7702A(b) or a life insurance contract which is

received in exchange for a modified endowment contract.

Section 7702A(c)(3)(A)(i) provides that, if there is a "material change" within the meaning of section 7702A(c)(3) to a life insurance contract that is subject to section 7702A, the contract is treated as entered into on the day that the material change takes effect. A material change in the benefits under (or in other terms of) the contract includes any increase in the death benefit under the contract or any increase in, or addition of, a qualified additional benefit under the contract.

Section 101(a) provides in part that gross income does not include amounts received (whether in a single sum or otherwise) under a life insurance contract, if the amounts are paid by reason of the death of the insured.

Section 72(c)(1) defines investment in the contract for purposes of determining the exclusion ratio for amounts received as an annuity under an annuity, endowment, or life insurance contract. Section 72(e)(6) defines investment in the contract for amounts received under an annuity, endowment, or life insurance contract if the amount is not received as an annuity and no other income tax provision applies. *See* Rev. Rul. 55–349, 1955–1 C.B. 232, (premiums for supplementary benefits excluded from the investment in the contract).

New Insurance Contracts

Insurance companies have developed insurance contracts which provide both death benefits and "living benefits" designed to assist policyholders with the rising costs of medical care, particularly medical care in the later years of life. Living benefits generally may be divided into two types of benefits. The first type of living benefit, an "accelerated death benefit," addresses the needs of terminally ill individuals who may incur substantial medical and living expenses prior to death. This benefit allows the policyholder, under a life insurance contract insuring a terminally ill individual, to "accelerate" the death benefit paid under the contract. Generally, the accelerated death benefit is equal to all or a portion of the death benefit discounted for the remaining life expectancy (generally 12 months or less) of the terminally ill individual. The payment of a benefit is conditioned upon the policyholder surrendering all or a portion of the policyholder's rights under the life insurance contract.

A second type of living benefit provides accident and health benefits upon the occurrence of certain morbidity risks, for example, a condition requiring a long-term stay in a nursing home or certain dread diseases. The living benefit is a specified amount which is determined by reference to all or a portion of the death benefit otherwise payable. As with accelerated death benefits, the payment of a benefit is conditioned upon the policyholder surrendering all or a portion of the policyholder's rights under the life insurance contract.

Explanation of Provisions

The proposed regulations are being promulgated to provide guidance concerning the tax treatment to the owners and issuers of insurance contracts that provide living benefits by addressing the application of sections 72, 101, 7702, and 7702A to those insurance contracts.

The proposed regulations allow qualified accelerated death benefits under an insurance contract to be treated as amounts paid by reason of the death of the insured for purposes of sections 101(a) and 7702. This proposed treatment allows an insurance contract including these benefits to continue to meet the definition of a life insurance contract under section 7702. The proposed regulations also permit a person who receives a qualified accelerated death benefit to exclude, under section 101(a), the benefit from gross income.

A qualified accelerated death benefit is defined in the proposed regulations as a benefit payable under a contract on the life of an insured who becomes terminally ill, where the amount of the death benefit made available cannot be discounted by more than 12 months at the rate of interest specified in the regulations. Under the proposed regulations an individual is terminally ill if the individual has an illness or physical condition that, notwithstanding appropriate medical care, is reasonably expected to result in death within 12 months from the date of payment of the accelerated death benefit. As the 12 month determination is necessarily subjective to some extent, it is expected that the insurer will act prudently in its determination of whether the person is terminally ill. The Service is considering whether to develop further guidance that would create a presumption of terminal illness in certain circumstances.

The proposed regulations also address the treatment, under section 7702, of other living benefits that provide payments upon the occurrence of a morbidity risk of an amount determined by reference to all or a portion of the death benefit otherwise payable under an insurance contract. For purposes of section 7702, the benefit could be viewed as an amount paid upon surrender of a contract and accordingly would be included in the cash surrender value of the contract. The impact of this characterization would be to disqualify as life insurance under section 7702 many contracts providing these benefits. Contracts with large cash surrender values would no longer qualify under the cash value accumulation test of section 7702(b) while contracts qualifying under the guideline premium test of section 7702(c) would fail the cash value corridor test of section 7702(d). For example, a policyholder, age 37, might own an insurance contract with a $100,000 face amount, that also provides for a payment of $70,000 upon surrender of the contract if the policyholder is hospitalized for a specified number of days. The $70,000 hospital benefit could result in the failure of the contract to qualify as a life insurance contract under section 7702.

To enable policyholders to avoid this result, the proposed regulations adopt an approach which assumes that a life insurance contract and an accident and health insurance contract which could be sold separately should be allowed to be sold together without endangering the qualification of the contract offering both benefits as a life insurance contract under section 7702. To preserve qualification of the contract offering both benefits as a life insurance contract, the proposed regulations exclude amounts payable as additional benefits (other than qualified additional benefits) from cash value if the following conditions are satisfied: (1) The benefits are paid solely upon the occurrence of a morbidity risk, (2) the charges for the benefits are separately stated and currently imposed by the insurer, and (3) the charges are not included in premiums taken into account in the determination of the investment in the contract under section 72 and are not taken into account in the determination of premiums paid under section 7702(f)(1).

If the three conditions are met, the proposed regulations treat a life insurance contract with an additional accident and health benefit as providing both a potential death benefit and a potential living benefit which is paid upon the occurrence of a morbidity risk. The living benefit is treated as being comprised of two elements: (1) A payment upon the partial or full surrender of the life insurance contract for part or all of the cash value, and (2) a payment upon the occurrence of a morbidity event of an additional accident and health benefit equal to the difference between the total payment

received and the amount received by the policyholder on the full or partial surrender of the contract. If, however, the three conditions are not satisfied, the additional benefit will not be excluded from cash value under section 7702.

The requirement that morbidity risk charges for living benefits be separately stated and currently imposed by the terms of the life insurance contract is necessary if section 7702 is to operate in the manner intended by Congress. Providing for the proper allocation and treatment of charges for these contracts assures the appropriate treatment of amounts paid into the contract and benefits paid.

The approach in the proposed regulations is intended to level the playing field between contracts that provide accident and health benefits in conjunction with life insurance benefits and contracts that provide only accident and health benefits. Thus, the approach of the proposed regulations will allow a contract providing both accident and health and life insurance benefits to continue to qualify as a life insurance contract under section 7702 so long as the contract provides appropriate treatment of the charges for the accident and health benefits.

The proposed regulations also exclude from cash value qualified additional benefits, certain amounts returned upon termination of a credit life insurance contract, and reasonable termination dividend.

The proposed regulations define cash surrender value, net surrender value, and death benefit for purposes of section 7702.

Proposed Effective Dates

The proposed regulations under section 7702, relating to the definition of cash value and the tax treatment of certain benefits, would be effective generally for contracts issued or entered into after June 30, 1993.

Under the proposed regulations, the provision of certain benefits or loans in a life insurance contract before July 1, 1993, does not increase the cash value of the contract. The proposed regulations also provide that the addition to a life insurance contract, before July 1, 1993, of certain benefits or loans has no effect on the date that the contract was issued or entered into for purposes of section 7702 and 7702A, and does not cause a material change in the contract under section 7702A.

The addition of a qualified accelerated death benefit (or an additional benefit satisfying the three conditions specified in proposed § 1.7702–2(f)) to a life insurance contract at any time has no effect on the date that the contract was issued or entered into for purposes of section 7702 and 7702A, and does not cause a material change in the contract under section 7702A.

The section 101 exclusion provided by the proposed regulations for qualified accelerated death benefits would be effective for amounts received on or after the date on which final regulations defining a qualified accelerated death benefit are published in the **Federal Register.**

Special Analyses

It has been determined that these proposed rules are not major rules as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations, and, therefore, an initial Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the proposed regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Comments and Request for a Public Hearing

Before the adoption of these proposed regulations, consideration will be given to any written comments that are timely submitted (preferably a signed original and eight copies) to the Internal Revenue Service.

Comments are specifically requested on the need for special rules under section 7702(f)(7) for contracts that do not terminate upon payment of a morbidity benefit or a qualified accelerated death benefit. Comments are also requested on whether the proposed regulations treat additional benefits insuring morbidity risks that are attached to a life insurance contract in the same fashion as contracts which provide similar benefits that are not attached to a life insurance contract. Finally, comments are requested on whether the regulations should specify how premiums and charges should be allocated among the various benefits provided under a life insurance contract.

All comments will be available for public inspection and copying in their entirety. A public hearing has been scheduled for March 19, 1993. See notice of hearing published elsewhere in this issue of the **Federal Register.**

Drafting Information

The principal author of these proposed regulations is Ann H. Logan, Office of the Assistant Chief Counsel (Financial Institutions and Products), Office of Chief Counsel, Internal Revenue Service. However, personnel from other offices of the Service and the Treasury Department participated in developing the regulations, in matters of both substance and style.

List of Subjects

26 CFR 1.101–1 through 1.133–1T

Income taxes, Reporting and recordkeeping requirements.

26 CFR 1.7702–0 through 1.7702A–1

Life insurance contract, Taxes.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1953

Paragraph 1. The authority citation for part 1 is amended by adding a citation to read as follows:

Authority: 26 U.S.C. 7805 * * * Section 1.7702–2 also issued under 26 U.S.C. 7702(k) * * *

Par. 2 Section 1.101–8 is added to read as follows:

§ 1.101–8 Amounts paid with respect to terminally ill individuals.

For purposes of section 101(a), a qualified accelerated death benefit (as defined in § 1.7702–2(d)), received on or after [*date on which final regulations are published in the* **Federal Register**], is treated as an amount paid by reason of the death of the insured.

Par. 3. Section 1.7702–0 is added to read as follows.

§ 1.7702–0 Table of contents.

This section lists the captions that appear in §§ 1.7702–1 and 1.7702–2.

§ 1.7702–1 Mortality charges.

(a) General rule.
(b) Reasonable mortality charges.
  (1) Actually expected to be imposed.
  (2) Limit on charges.
(c) Safe harbors.
  (1) 1980 C.S.O. Basic Mortality Tables.
  (2) Unisex tables and smoker/nonsmoker tables.
  (3) Certain contracts based on 1958 C.S.O. table.
(d) Definitions.
  (1) Prevailing commissioners' standard tables.
  (2) Substandard risk.
  (3) Nonparticipating contract.

(4) Charge reduction mechanism.
(5) Plan of insurance.
(e) Effective date.

§ 1.7702–2 Definitions.

(a) In general.
(b) Cash value.
(1) In general.
(2) Amounts excluded from cash value.
(c) Death benefit.
(1) In general.
(2) Qualified accelerated death benefit treated as death benefit.
(d) Qualified accelerated death benefit.
(1) In general.
(2) Determination of present value of the reduction in death benefit.
(3) Examples.
(e) Terminally ill defined.
(f) Certain other additional benefits.
(1) In general.
(2) Examples.
(g) Adjustments under section 7702(f)(7).
(h) Cash surrender value.
(1) In general.
(2) For purposes of section 7702(f)(7).
(i) Net surrender value.
(j) Effective date and special rules.
(1) In general.
(2) Provision of certain benefits before July 1, 1993.
(i) Not treated as cash value.
(ii) No effect on date of issuance.
(iii) Special rule for addition of benefit or loan provision after December 15, 1992.
(3) Addition of qualified accelerated death benefit.
(4) Addition of other additional benefits.

Par. 4. Sections 1.7702–2 and 1.7702A–1 are added to read as follows:

§ 1.7702–2 Definitions.

(a) *In general.* Paragraphs (b) through (i) of this section provide definitions and other rules only for purposes of section 7702.

(b) *Cash value*—(1) *In general.* Except as otherwise provided in paragraph (b)(2) of this section, the cash value of a contract is the greater of—

(i) The maximum amount payable under the contract (determined without regard to any surrender charge or policy loan); or

(ii) The maximum amount that the policyholder can borrow under the contract.

(2) *Amounts excluded from cash value.* The cash value of a contract does not include—

(i) The amount of any death benefit (as defined in paragraph (c) of this section);

(ii) The amount of any qualified additional benefit;

(iii) The amount of any other benefit described in paragraph (f) of this section;

(iv) An amount returned to the insured upon termination of a credit life insurance contract due to a full repayment of the debt covered by the contract; or

(v) A reasonable termination dividend not in excess of $35 for each $1,000 of the face amount of the contract.

(c) *Death benefit*—(1) *In general.* A death benefit is the amount payable by reason of the death of the insured (determined without regard to any qualified additional benefits).

(2) *Qualified accelerated death benefit treated as death benefit.* For purposes of paragraph (b)(2)(i) of this section, the amount payable as a qualified accelerated death benefit as defined in paragraph (d) of this section (but determined without regard to any reduction for discounting) is treated as a death benefit.

(d) *Qualified accelerated death benefit*—(1) *In general.* A benefit payable prior to death (accelerated benefit) is a qualified accelerated death benefit if, under the contract, the following conditions are satisfied—

(i) The accelerated benefit is payable only if the insured becomes terminally ill (as defined in paragraph (e) of this section);

(ii) The amount of the accelerated benefit is equal to or more than the present value of the reduction in the death benefit otherwise payable in the event of the death of the insured (without regard to any qualified additional benefits); and

(iii) The ratio of the cash surrender value of the contract immediately after the payment of the accelerated benefit to the cash surrender value of the contract immediately before the payment of the accelerated benefit is equal to or greater than the ratio of the death benefit immediately after the payment of the accelerated benefit to the death benefit immediately before the payment of the accelerated benefit.

(2) *Determination of present value of the reduction in death benefit.* For purposes of paragraph (d)(1)(ii) of this section, the present value of the reduction in death benefit occurring upon payment of a qualified accelerated death benefit must be determined by—

(i) Using as the discount rate the greater of—

(*A*) The applicable federal interest rate determined under section 846(c)(2); or

(*B*) The interest rate applicable to policy loans under the contract; and

(ii) Assuming that the death benefit (or the portion thereof) would have been paid 12 months after the date of the payment of the accelerated benefit.

(3) *Examples.* The following examples illustrate the provisions of this paragraph (d).

Example 1. B owns an insurance contract with a death benefit of $100,000 and a cash value of $30,000. In 1994, the insured becomes terminally ill (as defined in paragraph (e) of this section). In 1994, *B* receives an accelerated benefit equal to forty percent of the death benefit under the contract (discounted in accordance with to the rules of paragraph (d)(2) of this section). As a result of the payment of the accelerated benefit, the amount that *B* is entitled to receive upon the surrender of the contract is reduced by $12,000 (forty percent of $30,000) to $18,000. The ratio of the cash surrender value of the contract immediately after the payment of the accelerated benefit to the cash surrender value of the contract immediately before the payment of the accelerated benefit (18:30) is equal to the ratio of the death benefit immediately after the payment of the accelerated benefit to the death benefit immediately before the payment of the accelerated benefit (60:100). The accelerated benefit constitutes a qualified accelerated death benefit.

Example 2. C owns an insurance contract with a death benefit of $100,000. In 1994, the insured becomes terminally ill (as defined in paragraph (e) of this section). The policy loan rate specified in the contract is 10 percent and exceeds the federal applicable rate determined under section 846(c). In 1994, *C* receives an accelerated benefit equal to the entire death benefit of the policy discounted by 10 percent for 12 months from the date of payment and the contract terminates. The accelerated benefit is not a qualified accelerated death benefit.

Example 3. The facts are the same as in *Example 2* except that *C* receives an accelerated benefit equal to the entire death benefit of the policy discounted by 20 percent for 12 months from the date of payment and the contract terminates. The accelerated benefit is a qualified accelerated death benefit.

(e) *Terminally ill defined.* An individual is terminally ill if the insurer determines that the individual has an illness or physical condition that, notwithstanding appropriate medical care, is reasonably expected to result in death within 12 months from the date of payment of the accelerated death benefit.

(f) *Certain other additional benefits*—(1) *In general.* An additional benefit is described in this paragraph (f) if the following conditions are satisfied—

(i) The benefit is payable solely upon the occurrence of a morbidity risk;

(ii) The charges for the benefit are separately stated and currently imposed by the terms of the contract; and

(iii) The charges for the benefit are not included in premiums taken into account in the determination of the investment in the contract under section 72(c)(1) or 72(e)(6) and are not taken into account in the determination of premiums paid under section 7702(f)(1).

(2) *Examples.* The following examples illustrate the provisions of this paragraph (f):

Example 1. *A* owns an insurance contract with a death benefit of $100,000. The contract contains a provision that upon the occurrence of a morbidity risk, the insurance company will pay to *A* a morbidity benefit equal to 70 percent of the contract's death benefit in complete termination of *A*'s rights under the contract. Upon surrender of the contract prior to the occurrence of the morbidity risk, *A* currently would be entitled to receive $40,000. The morbidity benefit is payable solely upon the occurrence of a morbidity risk. The charges for the morbidity benefit are separately stated and currently imposed under the contract. The charges for the morbidity benefit are not included in premiums taken into account in the determination of the investment in the contract under section 72(c)(1) or 72(e)(6) and are not taken into account in the determination of premiums paid under section 7702(f)(1). The excess of the $70,000 (70 percent of $100,000) payable to *A* upon the occurrence of the morbidity risk over $40,000 is an additional benefit which is not a qualified additional benefit. The additional benefit is described in this paragraph (f). Under paragraph (b)(2)(iii) of this section, the amount of the additional benefit (the $30,000 payable by reason of the occurrence of a morbidity risk) is not included in the contract's cash value. Accordingly, $40,000 is treated as cash value payable upon complete surrender of the contract while the remaining $30,000 is treated as a morbidity benefit under the contract.

Example 2. The facts are the same as in *Example 1* except that the charges for the morbidity benefit are not separately stated and currently imposed. The benefit is not described in this paragraph (f) and consequently the benefit is not excluded from the cash value of the contract. Under paragraph (b)(2)(iii) of this section, the contract's cash value includes the amounts payable by reason of the occurrence of a morbidity risk.

Example 3. The facts are the same as in *Example 1* except that the charges for the morbidity benefit are included in premiums taken into account in the determination of the investment in the contract under section 72(c)(1) or 72(e)(6). The benefit is not described in this paragraph (f) and consequently the benefit is not excluded from the cash value of the contract. Under paragraph (b)(2)(iii) of this section, the contract's cash value includes the amounts payable by reason of the occurrence of a morbidity risk.

(g) *Adjustments under section 7702(f)(7).* If a life insurance contract is not terminated upon the payment of a qualified accelerated death benefit or an additional benefit described in paragraph (f) of this section, any change in the benefits under (or in other terms of) the contract is a change not reflected in any previous determination or adjustment under section 7702 and is an adjustment event under section 7702(f)(7).

(h) *Cash surrender value*—(1) *In general.* Except as provided in paragraph (h)(2) of this section, cash surrender value of a contract is its cash value, as determined under paragraph (b) of this section.

(2) *For purposes of section 7702(f)(7).* For purposes of determining the recapture ceiling under section 7702(f)(7), cash surrender value is the amount that would be payable under the contract (determined without regard to any surrender charge, policy loan, or reasonable termination dividends) if the contract were terminated immediately prior to the change in the benefits under (or in other terms of) the contract.

(i) *Net surrender value.* For purposes of section 7702(g), the net surrender value of a contract at any time is the amount that would be payable under the contract (determined with regard to surrender charges but without regard to any policy loan) if the contract were terminated at that time.

(j) *Effective date and special rules*—(1) *In general.* Except as otherwise provided in this paragraph (j), this section applies only with respect to contracts issued or entered into after June 30, 1993.

(2) *Provision of certain benefits before July 1, 1993*—(i) *Not treated as cash value.* If a benefit or loan payable only in the event the insured becomes terminally ill (as defined in paragraph (e) of this section), or an additional benefit (other than a qualified additional benefit) or loan payable solely upon the occurrence of a morbidity risk, is provided in a life insurance contract before July 1, 1993, the benefit or loan is not treated as cash value under section 7702.

(ii) *No effect on date of issuance.* If a benefit or loan provision described in paragraph (j)(2)(i) of this section is added to a life insurance contract before July 1, 1993, the addition of the benefit or loan has no effect on the date that the contract was issued or entered into for purposes of section 7702.

(iii) *Special rule for addition of benefit or loan provision after December 15, 1992.* This paragraph (j)(2) applies with respect to a benefit or loan provision added to a life insurance contract after December 15, 1992 only if the insurer can demonstrate that the benefit or loan provision was available under a life insurance contract issued in the United States as of December 15, 1992.

(3) *Addition of qualified accelerated death benefit.* If a qualified accelerated death benefit (as defined in paragraph (d) of this section) is added to a life insurance contract at any time—

(i) The addition of the benefit has no effect on the date that the contract was issued or entered into for purposes of section 7702; and

(ii) Paragraph (b)(2)(i) of this section shall apply to the qualified accelerated death benefit.

(4) *Addition of other additional benefits.* If an additional benefit described in paragraph (f) of this section is added to a life insurance contract at any time—

(i) The addition of the benefit has no effect on the date that the contract was issued or entered into for purposes of section 7702; and

(ii) The benefit is not treated as cash value under section 7702.

§ 1.7702A–1 Addition of certain benefits.

(a) *Addition of certain benefits before July 1, 1993*—(1) *No effect on date of issuance.* If a benefit or loan payable only in the event the insured becomes terminally ill (as defined in § 1.7702–2(e)), or an additional benefit (other than a qualified additional benefit) or loan payable solely upon the occurrence of a morbidity risk, is added to a life insurance contract before July 1, 1993, the addition of the benefit or loan provision has no effect on the date that the contract was issued or entered into for purposes of section 7702A.

(2) *No material change.* If a benefit or loan provision described in paragraph (a)(1) of this section is added to a life insurance contract before July 1, 1993, the addition of the benefit is not treated as a material change under section 7702A(c)(3).

(3) *Special rule for addition of benefit or loan provision after December 15, 1992.* This paragraph (a) applies with respect to a benefit or loan provision added to a life insurance contract after December 15, 1992 only if the insurer can demonstrate that the benefit or loan provision was available under a life insurance contract issued within the United States as of December 15, 1992.

(b) *Addition of qualified accelerated death benefit.* If a qualified accelerated death benefit (as defined in § 1.7702–2(d)) is added to a life insurance contract at any time—

(1) The addition of the benefit has no effect on the date that the contract was issued or entered into for purposes of section 7702A; and

(2) The addition of the benefit is not treated as a material change under section 7702A(c)(3).

(c) *Addition of other additional benefits.* If an additional benefit described in § 1.7702–2(f) is added to a life insurance contract at any time—

(1) The addition of the benefit has no effect on the date that the contract was issued or entered into for purposes of section 7702A; and

(2) The addition of the benefit is not treated as a material change under section 7702A(c)(3).

Michael P. Dolan,

Acting Commissioner of Internal Revenue.

[FR Doc. 92–29919 Filed 12–14–92; 8:45 am]

BILLING CODE 4830–01–M

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26 CFR Part 1

[FI–25–92]

RIN 1545–AQ70

Qualified Accelerated Death Benefits Under Life Insurance Contracts; Hearing

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of public hearing on proposed regulations.

SUMMARY: This document provides notice of a public hearing on proposed Income Tax Regulations relating to the definition of a life insurance contract for Federal tax purposes and to the Federal income tax treatment of amounts received as qualified accelerated death benefits.

DATES: The public hearing will be held on Friday, March 19, 1993, beginning at 10 a.m. Requests to speak and outlines of oral comments must be received by Friday, February 26, 1993.

ADDRESSES: The public hearing will be held in the IRS Auditorium, Seventh Floor, 7400 Corridor, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC. Requests to speak and outlines of oral comments should be submitted to the Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Attn: CC:CORP:T:R [FI–25–92], room 5228, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: Mike Slaughter of the Regulations Unit, Assistant Chief Counsel (Corporate), (202) 622–7190 (not a toll-free number).

SUPPLEMENTARY INFORMATION: The subject of the public hearing is proposed regulations to amend the Income Tax Regulations (26 CFR part 1) under sections 101, 7702, and 7702A of the Internal Revenue Code, to the treatment of life insurance contract under section 7702A, and to the Federal income tax treatment of amounts received as qualified accelerated death benefits under section 101. These proposed regulations appear elsewhere in this issue of the **Federal Register.**

The rules of § 601.601(a)(3) of the "Statement of Procedural Rules" (26 CFR part 601) shall apply with respect to the public hearing. Persons who have submitted written comments within the time prescribed in the notice of proposed rulemaking and who also desire to present oral comments at the hearing on the proposed regulations should submit not later than Friday, February 26, 1993, an outline of the oral comments/testimony to be presented at the hearing and the time they wish to devote to each subject.

Each speaker (or group of speakers representing a single entity) will be limited to 10 minutes for an oral presentation exclusive of the time consumed by the questions from the panel for the government and answers to these questions.

Because of controlled access restrictions, attendees cannot be admitted beyond the lobby of the Internal Revenue Building until 9:45 a.m.

An agenda showing the scheduling of the speakers will be made after outlines are received from the persons testifying. Copies of the agenda will be available free of charge at the hearing.

By direction of the Commissioner of Internal Revenue.

Dale D. Goode,

Federal Register Liaison Officer, Assistant Chief Counsel (Corporate).

[FR Doc. 92–29920 Filed 12–14–92; 8:45 am]

BILLING CODE 4830–01–M

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26 CFR Part 1

[PS–91–90]

RIN 1545–AP52

Partnership Transactions Involving Equity Interests of a Partner

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: Section 631 of the Tax Reform Act of 1986 was intended to repeal the *General Utilities* doctrine which, under certain circumstances, permitted a corporation to distribute appreciated assets to its shareholders without recognizing gain. The Service has determined that, in certain circumstances, the acquisition (or mere ownership) by a partnership of stock in one of its corporate partners results in avoidance of the repeal of the *General Utilities* doctrine. This document contains proposed regulations that prevent a corporate partner from avoiding corporate-level gain through transactions with a partnership involving equity interests of the partner. The intended effect of these proposed regulations is to provide for gain recognition in such circumstances.

DATES: Written comments and requests to appear, and outlines of oral comments to be presented, at a public hearing scheduled for February 3, 1993 must be received by January 20, 1993. See notice of public hearing on these proposed regulations published elsewhere in this issue of the **Federal Register.**

ADDRESSES: Send comments, requests to speak at the public hearing, and outlines of oral comments to: Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Attn: CC:CORP:T:R (PS–91–90), room 5228, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: Channing Brackey at (202) 622–3070 or Tom Matragrano at (202) 622–7530 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Introduction

This document contains proposed income tax regulations under section 337(d) of the Internal Revenue Code implementing Notice 89–37, 1989–1 C.B. 679. In the notice, the Internal Revenue Service stated that it would publish regulations to prevent the use of a partnership to circumvent the repeal of the *General Utilities* doctrine. Section 337(d) provides the Service authority to issue such regulations as may be necessary and appropriate to carry out the purposes of the repeal, "including regulations to ensure that such purposes may not be circumvented through the use of any provision of the law or regulations."

Prior to the repeal of the *General Utilities* doctrine, a corporation recognized no gain or loss on certain distributions of property to its shareholders. Following the repeal, a corporation generally recognizes gain on the distribution of appreciated property to a shareholder.

In Notice 89–37, the Service clarified that section 311(b), rather than section 731(a), applies when a partner receives a partnership distribution of its own stock (the distribution rule). Further, the Service stated that the partner recognizes gain when a pre-distribution transaction (or series of transactions) has the economic effect of an exchange by the partner of appreciated property for its stock (the deemed redemption rule). Finally, the Notice indicated that some of the transactions subject to these regulations also may be subject to taxation under the "substance over form" principle or section 707(a)(2)((B), and this continues to be true.

Explanation of Provisions

In General

This section sets forth rules that apply when a partnership, either directly or indirectly, owns, acquires, or distributes the stock of a partner. The proposed regulations adopt a deemed redemption rule and a distribution rule.

The Deemed Redemption Rule

Under the deemed redemption rule, a partner recognizes gain at the time of, and to the extent that, any transaction (or series of transactions) has the economic effect of a partner exchanging its interest in appreciated property for an interest in its stock that is owned or acquired by the partnership. The economic effect of an exchange of property for stock may occur when the partner contributes property to the partnership. It may also occur when a partnership acquires stock of a partner, when a partnership makes disproportionate distributions, or when the partnership agreement is amended to provide different sharing ratios.

The Distribution Rule

Under the distribution rule, a partnership distribution to a partner of its stock is treated as a redemption of the partner's stock in exchange for all or a portion of the partner's partnership interest. Therefore, the regulations provide that the general nonrecognition rule of section 731(a) does not apply to the extent a partner receives a distribution of its own stock.

The Service received comments on Notice 89–37 suggesting that a modified distribution rule be adopted. Under the modified distribution rule, the gain recognized on the distribution generally would be limited to the difference between the partnership's basis in the stock of the partner before the distribution and the partner's basis in the stock if determined under section 732(c). Proponents of the modified distribution rule believe that the stock treated as redeemed under the deemed redemption rule should be treated as owned by the redeeming partner for certain purposes and owned by the partnership for other purposes. Otherwise, they argue, the same stock could be treated as redeemed by a partner more than once. An alternative characterization, and the one adopted in the proposed regulations, is that the redeeming partner be treated as contributing the redeemed stock back to the partnership for all purposes. The Service considered the modified distribution rule, but rejected that approach because the distribution rule is more administrable and requires less complex rules.

Affiliate Stock and Other Equity Interests

The proposed regulations also apply to transactions involving stock of an affiliate of the partner or other equity interests in the partner or affiliate, including options, warrants, and similar interests. A corporation is treated as an affiliate of a partner at the time of a deemed redemption or distribution by the partnership if, immediately thereafter, the partner and corporation are members of an affiliated group.

De minimis Rule and Inadvertence Rule

The proposed regulations, under a *de minimis* rule, do not apply to a partner for a taxable year if the partner has never owned more than five percent of the partnership, and as of the close of the taxable year and while the partner is a partner, the partnership has not held in the aggregate (whether or not held at any one time) the lesser of $250,000 of stock of the partner, or two percent of the value of any class of stock of the partner. Further, the rules do not apply to any stock of a partner that is disposed of by the partnership prior to the due date (including extensions) of its federal income tax return for the taxable year during which the stock is acquired (or for the taxable year in which the partner becomes a partner, whichever is applicable) and that is not distributed to the partner or affiliate.

Effective Date

The regulations are proposed to apply to any transaction or distribution occurring after March 9, 1989.

Special Analysis

It has been determined that these rules are not major rules as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations, and therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on the impact of the rules on small business.

Comments and Public Hearing

Before adopting these proposed regulations as final regulations, consideration will be given to any written comments that are submitted timely (preferably a signed original and eight copies) to the Internal Revenue Service. All comments will be available for public inspection and copying in their entirety. A public hearing will be held upon written request to the Internal Revenue Service by any person who also submits written comments. If a public hearing is held, notice of the time and place will be published in the **Federal Register**.

Drafting Information

The principle authors of these regulations are Channing Brackey of the Office of Assistant Chief Counsel (Passthroughs and Special Industries) and Tom Matragrano of the Office of Assistant Chief Counsel (Corporate), Internal Revenue Service. Other personnel from the Internal Revenue Service and the Treasury Department participated in their development.

List of Subjects in 1.336–1 through 1.338(h)(10)–1T

Income taxes, Reporting and recordkeeping requirements, Securities.

PART 1—INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1953

Paragraph 1. The authority citation for part 1 is amended by adding the following citation to read as follows:

Authority: 26 U.S.C. 7805 * * * Section 1.337(d)–3 also issued under 26 U.S.C. 337(d) * * *

Par. 2. Section 1.337(d)–3 is added to read as follows:

§ 1.337(d)–3 Gain recognition upon certain partnership transactions involving a partner's stock.

(a) *In general.* This section applies when a partnership, either directly or indirectly, owns, acquires, or distributes the stock of a partner. Under this section, a partner recognizes gain when it is treated as increasing its interest in its own stock in exchange for appreciated property (the deemed redemption rule). Further, if the partnership distributes stock of a partner to the partner, the partner is treated as redeeming its stock for a portion of its partnership interest and recognizes gain, if any (the distribution rule).

(b) *Purpose.* The purpose of this section is to prevent corporate taxpayers, through the use of a partnership, from avoiding the gain required to be recognized under sections 311 or 337(d). The rules of this section, including the determination of the amount of gain, must be applied in a

manner that is consistent with and reasonably carries out the purposes of this section.

(c) *Stock of a Partner.* For purposes of this section, stock of a partner includes a partner's stock, an affiliate's stock, or other equity interests in the partner or affiliate, including options, warrants, and similar interests. A corporation is treated as an affiliate of a partner at the time of a deemed redemption or distribution by the partnership if, immediately thereafter, the corporation and the partner are members of an affiliated group as defined in section 1504 (a), without regard to the exceptions in section 1504(b).

(d) *Deemed redemption rule*—(1) *In general.* A partner recognizes gain at the time of, and to the extent that, any transaction (or series of transactions) has the economic effect of an exchange by a partner of its interest in appreciated property for an interest in the stock of the partner owned, acquired, or distributed by the partnership. The economic effect of an exchange of property for stock may occur when the partner contributes property to a partnership which owns stock of a partner. It may also occur when a partnership acquires the stock of a partner, when a partnership makes disproportionate distributions, when a partnership agreement is amended to provide different sharing ratios, or when the *de minimis* rule of paragraph (f) (1) of this section no longer applies.

(2) *Basis.* If gain is recognized under this paragraph (d), appropriate adjustments in basis are made to take the gain into account.

(3) *Partner's interest in its own stock.* For purposes of the deemed redemption rule, a partner's interest in the stock of the partner held by the partnership is determined based on all the facts and circumstances, including allocations and distribution rights.

(e) *Distribution rule*—(1) *In general.* The distribution by a partnership to a partner of stock of the partner is treated as a redemption or an exchange of the stock of the partner for a portion of the partner's partnership interest with a value equal to the stock distributed. Section 311 or 1001 rather than section 731 applies to that portion of the distribution.

(2) *Distribution rule and section 732.* Section 732 does not apply to a distribution of stock of a partner if this paragraph (e) applies. If the distribution to a partner of the stock of that partner is part of a larger distribution, the distribution of the stock of the partner is treated as a separate transaction that occurs before the distribution of the other property.

(f) *Exceptions*—(1) *De minimis rule.* This section does not apply to a partner for a taxable year if—

(i) The partner has never owned more than five percent of the partnership; and

(ii) As of the close of the taxable year and while the partner is a partner, the partnership has not held in the aggregate (whether or not held at any one time) the lesser of—

(A) $250,000 of stock of the partner; or

(B) Two percent of the value of any class of stock of the partner.

(2) *Inadvertence rule.* This section does not apply to any stock of a partner that is—

(i) Disposed of by the partnership prior to the due date (including extensions) of its Federal income tax return for the taxable year during which the stock is acquired (or for the taxable year in which the partner becomes a partner, whichever is applicable); and

(ii) Not distributed to the partner or affiliate.

(g) *Effective date.* These regulations apply to any transaction or distribution that occurs after March 9, 1989.

(h) *Examples.* The following examples illustrate the principles of this section. For purposes of these examples, assume that the exceptions provided in paragraph (f) of this section do not apply.

Example 1. The deemed redemption and distribution rules. (i) In 1992, C, a corporation, and A, an individual, form partnership CA as 50-percent partners. C contributes Asset 1 with a $0 basis and $100 fair market value, and A contributes C stock with a basis and fair market value of $100. In 1998, when Asset 1 and the C stock each has a fair market value of $200, CA liquidates. C and A each receive 50 percent of Asset 1 and the C stock.

(ii) In 1992, the contributions have the economic effect of an exchange by C of its interest in appreciated property for an interest in its stock. Under the deemed redemption rule of paragraph (d) of this section, C is treated as exchanging an appreciated asset with a $0 basis and $50 fair market value for 50 percent of the partnership's C stock. C recognizes a $50 gain, and the basis of the partnership in Asset 1 and C's basis in the CA partnership interest each increase from $0 to $50.

(iii) Under the distribution rule of paragraph (e) of this section, when CA liquidates in 1998, C is treated under section 311 as redeeming the C stock received from the partnership (worth $100) in exchange for $100 of C's CA interest with a basis of $25 (one-half of C's basis in the partnership). Thus, C recognizes a $75 gain.

(iv) For purposes of section 731, C receives the 50-percent interest in Asset 1 in liquidation of its partnership interest. Under section 732, the remaining $25 basis in C's partnership interest is allocated to Asset 1.

Example 2. Gain in partnership interest. (i) In 1992, C, a corporation, and A, an individual, form partnership CA as 50-percent partners. C and A each contribute assets with a basis and value of $100. In 1998, when C's partnership interest has a basis of $100 and a value of $200 CA purchases C stock at a coast of $100.

(ii) In 1988, the purchase of the C stock by CA has the economic effect of an exchange by C of a portion of its partnership interest for an interest in its stock (one-half or $50 in value of the C stock). Under the deemed redemption rule of paragraph (d) of this section, C is treated as redeeming the C stock (worth $50) in exchange for $50 of C's CA interest with a basis of $25 (one-fourth of C's basis in the partnership). Thus, C recognizes a $25 gain and C's basis in CA increases from $100 to $125.

Example 3. Contribution of gain and loss property. (i) In 1992, C, a corporation, A, an individual, and B, an individual, form partnership CAB as 33⅓-percent partners. C contributes Asset 1 with a $9 basis and $90 fair market value and Asset 2 with a $90 basis and $9 fair market value. A contributes C stock with a basis and fair market value of $99. B contributes $99 of cash. In 1998, the assets have not changed in value and C receives the C stock in liquidation of its partnership interest.

(ii) In 1992, the contributions have the economic effect of an exchange by C of its interest in appreciated property for an interest in its stock. The rules of this section, including the determination of the amount gain, must be applied in a manner that is consistent with and carries out the purposes described in paragraph (b) of this section. Thus, C is treated as exchanging appreciated property with a $3.30 basis and $33 fair market value for one-third of the partnership's C stock worth $33. C recognizes a $29.70 gain.

(iii) In 1998, when C receives its stock in exchange for its partnership interest, C recognizes the remaining gain of $51.30.

Example 4. Stock acquired prior to effective date. (i) Prior to the effective date of these regulations, C, a corporation, and B form partnership CB. C contributes $1,000 of property (with a basis of $100) and B contributes $1,000 of cash. Also in the same year, CB purchases $1,000 of C stock. In 1994, CB makes a liquidating distribution of the C stock to C and the property to B. Assume that there has been no appreciation in the property or stock since acquired by the partnership.

(ii) In 1994, under this section, C is treated as exchanging an appreciated asset with a basis of $100 and value of $1,000 for CB's C stock. C recognizes a $900 gain.

M.P. Dolan,

Acting Commissioner of Internal Revenue.

[FR Doc. 92–30185 Filed 12–14–92; 8:45 am]

BILLING CODE 4830–01–M

26 CFR Part 1

[PS–91–90]

RIN 1545–AP52

Partnership Transactions Involving Equity Interests of a Partner; Hearing

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of public hearing on proposed regulations.

SUMMARY: This document provides notice of a public hearing on proposed Income Tax Regulations that prevent a corporate partner from avoiding corporate-level gain through transactions with a partnership involving equity interests of the partner.

DATES: The public hearing will be held on Wednesday, February 3, 1993, beginning at 10 a.m. Requests to speak and outlines of oral comments must be received by Wednesday, January 20, 1993.

ADDRESSES: The public hearing will be held in the IRS Auditorium, Seventh Floor, 7400 Corridor, Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC. Requests to speak and outlines of oral comments should be submitted to the Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Attn: CC:CORP:T:R [PS–91–90], room 5228, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: Mike Slaughter of the Regulations Unit, Assistant Chief Counsel (Corporate), 202–622–7190 (not a toll-free number).

SUPPLEMENTARY INFORMATION: The subject of the public hearing is proposed regulations under section 337(d) of the Internal Revenue Code implementing Notice 89–37, 1989–1 C.B. 679.

The rules of § 601.601(a)(3) of the "Statement of Procedural Rules" (26 CFR part 601) shall apply with respect to the public hearing. Persons who have submitted written comments within the time prescribed in the notice of proposed rulemaking and who also desire to present oral comments at the hearing on the proposed regulations should submit not later than Wednesday, January 20, 1993, an outline of the oral comments/testimony to be presented at the hearing and the time they wish to devote to each subject.

Each speaker (or group of speakers representing a single entity) will be limited to 10 minutes for an oral presentation exclusive of the time consumed by the questions from the panel for the government and answers to these questions.

Because of controlled access restrictions, attendees cannot be admitted beyond the lobby of the Internal Revenue Building until 9:45 a.m.

An agenda showing the scheduling of the speakers will be made after outlines are received from the persons testifying. Copies of the agenda will be available free of charge at the hearing.

By direction of the Commissioner of Internal Revenue.

Dale D. Goode,

Federal Register Liaison Officer, Assistant Chief Counsel (Corporate).

[FR Doc. 92–30186 Filed 12–14–92; 8:45 am]

BILLING CODE 4830–01–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[PA–15–1–5367; FRL–4545–2]

Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania Group III CTG: RACT for VOC's From Synthetic Organic Chemical Manufacturing Industries (SOCMI) in Allegheny County, PA

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: EPA is proposing a limited approval and limited disapproval of a request from the Pennsylvania Department of Environmental Resources (PADER) to revise the Allegheny County portion of the Commonwealth of Pennsylvania State Implementation Plan (SIP) submitted on July 13, 1987. This revision establishes and requires reasonably available control technology (RACT) to control fugitive volatile organic compound (VOC) emissions from synthetic organic chemical manufacturing industries (SOCMI), and the associated test method required to determine compliance. This revision has been submitted by PADER at the request of the Allegheny County Bureau of Air Pollution Control to fulfill its 1982 ozone SIP commitment to adopt all applicable control technique guidelines (CTGs) published by EPA. EPA has evaluated Article XX of the Rules and Regulations of the Allegheny County Health Department, section 534 and section 605 I of Article XX and is proposing a limited approval under section 110(k)(3) and 301(a) of the Clean Air Act, as amended in 1990 (CAA), because the regulation strengthens the SIP. At the same time, EPA is proposing a limited disapproval of Article XX, section 534 because the regulation does not fully meet the Part D, section 182(a)(2)(A) requirements of the CAA.

DATES: Comments must be received on or before January 14, 1993.

ADDRESSES: Comments may be mailed to Thomas J. Maslany, Director, Air, Radiation and Toxics Division, U.S. Environmental Protection Agency, Region III, 841 Chestnut Building, Philadelphia, Pennsylvania 19107. Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air, Radiation, and Toxics Division, U.S. Environmental Protection Agency, Region III, 841 Chestnut Building, Philadelphia, Pennsylvania 19107; Commonwealth of Pennsylvania, Department of Environmental Resources, Bureau of Air Quality Control, P.O. Box 2357, Executive House—2nd & Chestnut Street, Harrisburg, Pennsylvania 17120; and Allegheny County Health Department, Bureau of Air Pollution Control, 301 Thirty-ninth Street, Pittsburgh, Pennsylvania 15201.

FOR FURTHER INFORMATION CONTACT: Ms. Jacqueline R. Lewis, (215) 597–6863.

SUPPLEMENTARY INFORMATION: On September 12, 1978 EPA promulgated a list of ozone nonattainment areas under the provisions of the 1977 Clean Air Act (1977 CAA or pre-amended Act) that included the Southwest Pennsylvania Intrastate Air Quality Control Region (AQCR) in the Commonwealth of Pennsylvania. Allegheny County is in this AQCR 43 FR 40513, 40 CFR 81.339. Because Allegheny and other counties were unable to reach attainment by the statutory attainment date of December 31, 1982, Pennsylvania requested under section 172(a)(2), and EPA approved, an extension of the attainment date to December 31, 1987. 40 CFR 52.2022. The Pittsburgh-Beaver Valley metropolitan area, containing Allegheny County, did not attain the ozone standard by the approved attainment date. To fulfill the requirements of section 172(a)(2) and (b)(3) of the CAA and its 1982 SIP, PADER submitted a revision to the Allegheny County portion of the Pennsylvania ozone SIP and EPA on July 13, 1987.

On May 26, 1988, EPA notified the Governor of Pennsylvania that the Pittsburgh-Beaver Valley portion of the SIP was inadequate to attain and maintain the ozone standard and requested that deficiencies in the existing SIP be corrected (EPA's SIP-Call). On November 15, 1990, amendments to the 1977 CAA were enacted. Public Law 101–549, 104 Stat. 2399, codified at 42 U.S.C. 7401–7671q. In amended section 182(a)(2)(A) of the CAA, Congress statutorily adopted the

requirement that nonattainment areas fix their deficient RACT rules for ozone and establish a deadline of May 15, 1991 for states to submit corrections of those deficiencies.

In addition, although this submittal preceded the date of enactment of the CAA, it serves to fulfill part of the "RACT fix-up" requirement of section 182(a)(2)(A) of the amended Act for the Pittsburgh-Beaver Valley nonattainment area. Areas designated nonattainment before enactment of the Amendments and which retained that designation and were classified as marginal or above as of enactment are required to meet that RACT fix-up requirement. Under section 182(a)(2)(A), those areas were required by May 15, 1991, to correct RACT. RACT fix-ups were also required under pre-amended section 172(b) as that requirement was interpreted in pre-amended guidance.[1] The SIP call letters interpreted that guidance and indicated corrections necessary for specific nonattainment areas. The Pittsburgh-Beaver Valley nonattainment area is classified as moderate, and is, therefore, subject to the RACT fix-up requirement.[2]

For the purpose of assisting state and local agencies in developing RACT rules, EPA prepared a series of Control Technique Guideline (CTG) documents. The CTGs are based on the underlying requirements of the Act and specify the presumptive norms for what is RACT for specific source categories. Under the CAA, Congress ratified EPA's use of these documents, as well as other Agency policy, for requiring States to "fix-up" their RACT rules. See section 182(a)(2)(A). The CTG applicable to Allegheny County's revised Article XX section 534 is entitled "Control of Volatile Organic Compound Leaks from Synthetic Organic Chemical and Polymer Manufacturing Equipment" (SOCMI Fugitives (EPA 450/3–83–006, published March 1984)).

Further interpretations of EPA policy are found in the Blue Book. In general, these guidance documents have been set forth to ensure that VOC rules are fully enforceable and strengthen or maintain the SIP.

[1] Among other things, the pre-amendment guidance consists of the Post-87 policy, 52 FR 45044 (Nov. 24, 1987); the Bluebook, "Issues Relating to VOC Regulation Cutpoints, Deficiencies and Deviations, Clarification to Appendix D of November 24, 1987 **Federal Register** Notice" (of which notice of availability was published in the **Federal Register** on May 25, 1988); and the existing CTGs.

[2] The Pittsburgh-Beaver Valley area retained its designation and was classified by operation of law pursuant to section 107(d) and 181(a) upon the date of enactment of the amendments. See 56 FR 56694 (Nov. 6, 1991).

This revision establishes RACT for the control of fugitive emissions from SOCMI, adopted in accordance with the recommendations made in the CTG document, referenced above. The Allegheny County July 13, 1987 submittal also included an installation permit for an afterburner to control VOC emissions from an air oxidation process. Only the portion of the July 13, 1987 SIP revision submittal pertaining to the control of VOC leaks from SOCMI facilities and the associated test method are addressed by this rulemaking action and notice. The remaining portion of the SIP revision submittal will be the subject of a separate rulemaking action and notice.

Proposed SIP Revision

The proposed revision represents the revision of Article XX, by adding a new section 534, "Synthetic Organic Chemical and Polymer Manufacturing—Fugitive Sources" and paragraph I of section 605, the associated test method which references EPA method 21, required to determine compliance with section 534. EPA has reviewed this SIP revision submittal and has determined that the amendments constitute RACT for this source category. This regulation meets the requirements of the aforementioned CTG document, except as discussed below.

Allegheny County's Article XX, section 534 at paragraph D, provides for the Director of the Bureau to approve the use of alternative VOC emission reduction system and/or alternative monitoring procedures, without specifying that the use of such alternatives must also be approved by EPA. Because of this deficiency, the regulation is not approvable pursuant to 182(a)(2)(A) of the CAA because it is not consistent with the interpretation of section 172 of the pre-amendment guidance and may lead to regulatory enforceability problems.

Because of the above deficiency, EPA cannot grant full approval of this regulation under section 110(k)(3) and part D. Also, because section 534 is not composed of separable parts which meet all the applicable requirements of the CAA, EPA cannot grant partial approval of the regulation under section 110(k)(3).

However, EPA may grant a limited approval of the submitted regulation under section 110(k)(3) in light of EPA's authority pursuant to section 301(a) to adopt regulations necessary to further air quality by strengthening the SIP. The approval is limited because EPA's action also contains a simultaneous limited disapproval, due to the fact that the regulation does not meet the section 182(a)(2)(A) requirements of part D because of the noted deficiency. Thus, in order to strengthen the SIP, EPA is proposing a limited approval of Allegheny County's Article XX, section 534, under sections 110(k)(3) and 301(a) of the CAA.

At the same time, EPA is also proposing a limited disapproval of the regulation because section 534 at paragraph D of the County's regulation must be amended to require that the use of any alternative VOC emission reduction system and/or alternative monitoring procedures must be approved by the United States Environmental Protection Agency in addition to the Allegheny County Bureau of Air Pollution Control as required by section 182(a)(2)(A) of the CAA. Under section 179(a)(2), if the Administrator disapproves a submittal under section 110(k) for an area designated nonattainment based on the submittal's failure to meet one or more of the elements required by the Act, the Administrator must apply one of the sanctions set forth in section 179(b) unless the deficiency has been corrected within 18 months of such disapproval. Section 179(b) provides two sanctions available to the Administrator: Highway funding and offsets. The 18-month period referred to in section 179(a) will begin at the time EPA publishes the final notice of this disapproval. Moreover, the final disapproval triggers the 24-month period by the end of which EPA must promulgate a Federal implementation plan (FIP) under section 110(c).

Upon publishing a final notice of a limited approval and limited disapproval, that action will approve the rule into the SIP so that regulation is federally enforceable, and, at the same time, the final notice will require that the County correct the deficiency in the regulation within 18 months in order to avoid the promulgation of sanctions.

A more detailed description of EPA's evaluation of the above regulatory changes is presented in the Technical Support Document that has been prepared for this revision. That document is available for public inspection at the location provided in the **ADDRESSES** section of this notice.

Proposed Action

EPA is proposing a limited approval and limited disapproval of the addition of section 534, Synthetic Organic Chemical and Polymer Manufacturing—Fugitive Sources and section 605 I, the associated test method required to determine compliance with section 534, which revise Article XX, as a revision to

the Allegheny County portion of the Pennsylvania SIP.

Nothing in this action should be construed as permitting or allowing or establishing a precedent for any future request for revision to any state implementation plan. Each request for revision to the state implementation plan shall be considered separately in light of specific technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

SIP approvals under sections 110 and 301, and subchapter I, part D of the CAA do not create any new requirements but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP approval does not impose any new requirements, I certify that it does not have a significant impact on any small entities affected. Moreover, due to the nature of the Federal-State relationship under the CAA, preparation of a flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.* v. *U.S. EPA*, 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a)(2).

EPA's disapproval of the State request under section 110 and subchapter I, part D of the CAA does not affect any existing requirements applicable to small entities. Any pre-existing federal requirements remain in place after this disapproval. Federal disapproval of the state submittal does not affect its state-enforceability. Moreover, EPA's disapproval of the submittal does not impose any new Federal requirements. Therefore, EPA certifies that this disapproval action does not have a significant impact on a substantial number of small entities because it does not remove existing requirements and impose any new Federal requirements.

This action proposes limited approval and limited disapproval of a revision to the Allegheny County portion of the Pennsylvania SIP, section 534 which establishes RACT for the control of fugitive VOC emissions from SOCMI and paragraph I of section 605 the associated test method required to determine compliance. It has been classified as a Table 2 action by the Regional Administrator under the procedures published in the **Federal Register** on January 19, 1989 (54 FR 2214–2225). On January 6, 1989, the Office of Management and Budget waived Table 2 and Table 3 SIP revisions (54 FR 2222) from the requirements of section 3 of Executive Order 12291 for a period of two years. EPA has submitted a request for a permanent waiver for Tables 2 and 3 SIP revisions. The Office of Management and Budget has agreed to continue the temporary waiver until such time as it rules on EPA's request.

List of Subjects in 40 CFR Part 52

Air pollution control, Hydrocarbons, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Authority: 42 U.S.C. 7401–7671q.

Dated: October 16, 1992.

Stanley L. Laskowski,

Acting Regional Administrator, Region III.

[FR Doc. 92–30426 Filed 12–14–92; 8:45 am]

BILLING CODE 6560–50–M

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Part 67

[Docket No. FEMA–7048]

Proposed Flood Elevation Determinations

AGENCY: Federal Insurance Administration, FEMA.

ACTION: Correction of proposed rule.

SUMMARY: This document contains corrections to the proposed rule (Docket No. FEMA–7048), which was published on Thursday, August 20, 1992, (57 FR 37747). The correction more accurately represents the Flood Insurance Study and Flood Insurance Rate Map for the Town of Dover-Foxcroft, Piscataquis, Maine, than previously published.

DATES: The comment period is thirty (30) days following the second publication of this correction of the proposed rule in a newspaper of local circulation in the community.

ADDRESSES: The proposed base flood elevations for the community are available for inspection at the Dover-Foxcroft Town Office, 34 E. Main Street, Dover-Foxcroft, Maine.

FOR FURTHER INFORMATION CONTACT: William R. Locke, Chief, Risk Studies Division, Federal Insurance Administration, 500 C Street, SW., Washington, DC 20472, (202) 646–2766.

SUPPLEMENTARY INFORMATION:

Background

The Federal Emergency Management Agency (FEMA or Agency) publishes proposed determinations of base (100-year) flood elevations and modified base flood elevations for communities participating in the National Flood Insurance Program (NFIP), in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a). These base flood and modified base flood elevations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, state or regional entities. These proposed elevations are used to meet the floodplain management requirements of the NFIP and are also used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in these buildings.

Need for Correction

As published the proposed rule contained location and elevation information at three sources of flooding that must be corrected to represent more accurately than before the Flood Insurance Study and the Flood Insurance Rate Map for the Town of Dover-Foxcroft, Maine.

Accordingly, the proposed rule (Docket No. FEMA–7048) published as FR Doc. 92–19908 on August 20, 1992, 57 FR 37747, is corrected as follows:

§ 67.4 [Corrected]

On page 37752, under the entry for the Town of Dover-Foxcroft, Piscataquis County, Maine, the entries for Dunham Brook, Davee Brook, and East Branch Davee Brook, are corrected as follows:

Source of Flooding	Location	#Depth in feet above ground. *Elevation in feet (NGVD)	
		Existing	Modified
* * * * * * *			
Dunham Brook	Approximately 200 feet upstream from confluence with Piscataquis River	*345	*346
	At downstream side of Forest Street	*369	*368
Davee Brook	At upstream side of Railroad Avenue	*348	*349
	Approximately 220 feet downstream of confluence of East Branch Davee Brook	*373	*374
East Branch Davee Brook	Approximately 120 feet upstream of confluence with Davee Brook	*375	*374
	Approximately 190 feet upstream of upstream side of State Route 153	*375	*374
* * * * * * *			

(Catalog of Federal Domestic Assistance No. 83.100, "Flood Insurance.")

Issued: December 7, 1992.

C.M. "Bud" Schauerte,

Administrator, Federal Insurance Administration.

[FR Doc. 92–30259 Filed 12–14–92; 8:45 am]

BILLING CODE 6718–03–M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 92–284, RM–8119]

Radio Broadcasting Services; Repton, AL

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition for rule making filed by Curry Communications, Inc., requesting the allotment of FM Channel 266A to Repton, Alabama, as that community's first local aural transmission service. Coordinates used for this proposal are 31–24–30 and 87–14–24.

DATES: Comments must be filed on or before February 3, 1993, and reply comments on or before February 18, 1993.

ADDRESSES: Secretary, Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, as follows: Curry Communications, Inc., Attn: Albert Curry, President, 107 Pickens Street, Monroeville, AL 36460.

FOR FURTHER INFORMATION CONTACT: Nancy Joyner, Mass Media Bureau, (202) 634–6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 92–284, adopted November 18, 1992, and released December 9, 1992. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, Downtown Copy Center, (202) 452–1422, 1990 M St., NW., suite 640, Washington, DC 20036.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

Michael C. Ruger,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 92–30364 Filed 12–14–92; 8:45 am]

BILLING CODE 6712–01–M

47 CFR Part 73

[MM Docket No. 92–283, RM–8122]

Radio Broadcasting Services; Hope and Fordyce, AR

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition for the rule making filed on behalf of KdB, Inc., licensee of Station KXAR–FM, Channel 269A, Hope, Arkansas, seeking the substitution of Channel 269C2 for Channel 269A and modification of its license accordingly. In order to accommodate the request, petitioner seeks the substitution of Channel 272A for Channel 269A at Fordyce, Arkansas, and modification of the license of Station KQEW(FM), Channel 269A, accordingly. An Order to Show Cause is issued to Dallas Properties, Inc., licensee of Station KQEW (FM). Coordinates for Channel 269C2 at Hope, Arkansas, are 33–40–15 and 93–37–10; coordinates for Channel 272A at Fordyce Arkansas, are 33–48–17 and 92–26–07. Petitioner's modification proposal complies with the provisions of section 1.420(g) of the Commission's Rules. Therefore, we will not accept competing expressions of interest in the

use of Channel 269C2 at Hope, or require the petitioner to demonstrate the availability of an additional equivalent class channel.

DATES: Comments must be filed on or before February 3, 1993, and reply comments on or before February 18, 1993.

ADDRESSES: Secretary, Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner's counsel, as follows: Anne Thomas Paxson, Esq., Borsari & Paxson, 2033 M Street, NW., suite 630, Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: Nancy Joyner, Mass Media Bureau, (202) 634–6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 92–283, adopted November 18, 1992, and released December 9, 1992. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, Downtown Copy Center, (202) 452–1422, 1990 M St., NW., suite 640, Washington, DC 20036.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

Michael C. Ruger,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 92–30363 Filed 12–14–92; 8:45 am]

BILLING CODE 6712–01–M

47 CFR Part 76

[MM Docket No. 92–295, FCC 92–536]

Cable Television Services; List of Major Television Markets

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission invites comments on its proposal to grant a Petition for Rulemaking filed by TV 14, Inc. (TV 14) to amend the Commission Rules changing the designation of the Atlanta, Georgia, television market to include the community of Rome, Georgia, so that TV 14's station, WTLK (TV) may be considered a local station in the Atlanta area under the cable compulsory copyright license. This action is taken to test the proposal for market hyphenation through the record established based on comment filed by interested parties.

DATES: Comments are due by January 6, 1993, and reply comments are due by January 19, 1993.

ADDRESSES: Federal Communications Commission, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Alan E. Aronowitz, Mass Media Bureau, Policy and Rules Division (202) 632–7792.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making in MM Docket No. 92–295, FCC 92–536, adopted December 4, 1992, released December 8, 1992. The complete text of this document is available for inspection and copying during normal business hours in the FCC Reference Center, 1919 M Street, NW., room 239, Washington, DC, and also may be purchased from the Commission's copy contractor, Downtown Copy Center, at (202) 452–1422, 1990 M Street, NW., room 640, Washington, DC 20554.

Synopsis of the Notice of Proposed Rule Making

1. The Commission, in response to a Petition for Rulemaking filed by Channel 14, licensee of WRLK (TV), Rome, Georgia, proposes to amend section 76.51 of the Rules (47 CFR 76.51) to change the designation of the Atlanta, Georgia, television market to include the community of Rome, Georgia. In a previous decision (6 FCC Rcd 7234, 1991), the Commission granted a request by Channel 14 to include WTLK in the Atlanta market for purposes of section 73.658(m) of the Rules relating to territorial exclusivity. TV 14 now requests to be included in the Atlanta market so that WTLK may be considered a local station in the Atlanta area under the cable compulsory copyright license.

2. The Commission, based on the facts presented, believes that a sufficient case for market hyphenation has been set forth to justify testing this proposal through the rulemaking process and notice and comment procedures. Therefore, comment is requested on this proposal to amend section 76.51 of the Commission's Rules by adding Rome to the Atlanta, Georgia market designation.

Administrative Matters

Initial Regulatory Flexibility Analysis

3. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendment is promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by section 601(3) of the Regulatory Flexibility Act. A few number of television licensees and permittees will be affected by the proposed rule amendment. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the certification, to the chief counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Public Law No. 96–354, 94 Stat. 1164, 5 U.S.C. 601 *et seq.* (1981).

Ex Parte

4. This is a non-restricted notice and comment rule-making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. See *generally* 47 CFR 1.1202, 1.203, and 1.206(a).

Comment Dates

5. Pursuant to applicable procedures set forth in 1.415 and 1.419 of the Commission's Rules, 47 CFR 1.415 and 1.419, interested parties may file comments on or before January 6, 1993, and reply comments on or before January 19, 1993. To file formally in this proceeding, you must file an original plus four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular

business hours in the FCC Reference Center of the Federal Communications Commission, 1919 M Street, NW., room 239, Washington, DC 20554.

6. Authority for this proposed Rule Making is contained in sections 4(i) and (j), and 303 of the Communications Act of 1934, as amended.

List of Subjects in 47 CFR Part 76

Cable television.

Donna R. Searcy,

Secretary.

[FR Doc. 92–30362 Filed 12–14–92; 8:45 am]

BILLING CODE 6712–01–M

Notices

Federal Register
Vol. 57, No. 241
Tuesday, December 15, 1992

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Forest Service

Emerald Resource Unit Timber Sales; Idaho Panhandle National Forests, Benewah County, ID

AGENCY: Forest Service, USDA.

ACTION: Revised notice of intent to prepare an environmental impact statement.

SUMMARY: In accordance with Forest Service Handbook 1909.15, Chapter 21.2, it is necessary to publish a revised notice of intent in the **Federal Register** regarding any major changes, such as a delay of more than 6 months in filing either the draft or final EIS. The Draft EIS was released for public review on February 10, 1992 and notice is hereby given that the Final EIS for the Emerald Resource Unit Timber Sales is scheduled to be completed by April, 1993. Reference: **Federal Register**, Volume 56, No. 27, pages 5193--5194, dated Friday, February 8, 1991.

FOR FURTHER INFORMATION CONTACT: Questions should be directed to Tracy J. Gravelle, St. Maries Ranger District, P.O. Box 407, St. Maries, Idaho 83861. Phone: (208) 245–3531.

Dated: December 2, 1992.

Gary W. Sieren,

District Ranger, St. Maries Ranger District, Idaho Panhandle National Forests.

[FR Doc. 92–30392 Filed 12–14–92; 8:45 am]

BILLING CODE 3410–11–M

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Adjustment of Import Limits for Certain Cotton and Man-Made Fiber Textile Products Produced or Manufactured in the People's Republic of China

December 9, 1992.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs adjusting limits.

EFFECTIVE DATE: December 9, 1992.

FOR FURTHER INFORMATION CONTACT: Anne Novak, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port or call (202) 927–6703. For information on embargoes and quota re-openings, call (202) 482–3715.

SUPPLEMENTARY INFORMATION:

Authority: Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

The current limits for certain categories are being adjusted, variously, for swing and carryforward.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 56 FR 60101, published on November 27, 1991). Also see 56 FR 60976, published on November 29, 1991.

The letter to the Commissioner of Customs and the actions taken pursuant to it are not designed to implement all of the provisions of the bilateral agreement, but are designed to assist only in the implementation of certain of its provisions.

Auggie D. Tantillo,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

December 9, 1992.

Commissioner of Customs,
Department of the Treasury, Washington, DC 20229.

Dear Commissioner: This directive amends, but does not cancel, the directive issued to you on November 22, 1991, by the Chairman, Committee for the Implementation of Textile Agreements. That directive concerns imports of certain cotton, wool, man-made fiber, silk blend and other vegetable fiber textiles and textile products, produced or manufactured in the People's Republic of China and exported during the twelve-month period which began on January 1, 1992 and extends through December 31, 1992.

Effective on December 9, 1992, you are directed to amend further the directive dated November 22, 1991, to adjust the limits for the following categories, as provided under the terms of the current bilateral agreement between the Governments of the United States and the People's Republic of China:

Category	Adjusted twelve-month limit [1]
Levels not in group 226	10,219,894 square meters.
331	4,948,372 dozen pairs.
369–D [2]	4,560,250 kilograms.
607	745,985 kilograms.

[1] The limits have not been adjusted to account for any imports exported after December 31, 1991.
[2] Category 369–D: only HTS numbers 6302.60.0010, 6302.91.0005 and 6302.91.0045.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

Auggie D. Tantillo,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 92–30357 Filed 12–14–92; 8:45 am]

BILLING CODE 3510–DR–F

Announcement of Import Restraint Limits and Guaranteed Access Levels for Certain Cotton, Wool and Man-Made Fiber Textile Products Produced or Manufactured in Guatemala

December 9, 1992.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs establishing limits and guaranteed access levels for the new agreement year.

EFFECTIVE DATE: January 1, 1993.

FOR FURTHER INFORMATION CONTACT: Nicole Bivens Collinson, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port or call (202) 927–5850. For information on embargoes and quota re-openings, call (202) 482–3715.

SUPPLEMENTARY INFORMATION:

Authority: Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

Memoranda of Understanding (MOUs) dated June 26, 1992 and October 30, 1992 between the Governments of the United States and Guatemala establish import limits and guaranteed access levels (GAL) for cotton, wool and man-made fiber textile products in Categories 340/640 and 448 for the period beginning on January 1, 1993 and extending through December 31, 1993.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 57 FR 54976, published on November 23, 1992).

Requirements for participation in the Special Access Program are available in **Federal Register** notice 51 FR 21208, published on June 11, 1986; 52 FR 26057, published on July 10, 1987; 54 FR 50425, published on December 6, 1989; and 55 FR 3079, published on January 30, 1990.

The letter to the Commissioner of Customs and the actions taken pursuant to it are not designed to implement all of the provisions of the MOUs, but are designed to assist only in the implementation of certain of their provisions.

Auggie D. Tantillo,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

December 9, 1992.

Commissioner of Customs,

Department of the Treasury, Washington, DC 20229.

Dear Commissioner: Under the terms of section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854), and the Arrangement Regarding International Trade in Textiles done at Geneva on December 20, 1973, as further extended on July 31, 1991; pursuant to the Memoranda of Understanding (MOUs) dated June 26, 1992 and October 30, 1992 between the Governments of the United States and Guatemala; and in accordance with the provisions of Executive Order 11651 of March 3, 1972, as amended, you are directed to prohibit, effective on January 1, 1993, entry into the United States for consumption and withdrawal from warehouse for consumption of cotton, wool and man-made fiber textile products in the following categories, produced or manufactured in Guatemala and exported during the twelve-month period beginning on January 1, 1993 and extending through December 31, 1993, in excess of the following levels of restraint:

Category	Twelve-month limit
340/640	943,400 dozen.
448	41,873 dozen.

Imports charged to these category limits for the periods July 1, 1992 through December 31, 1992 (Category 448) and September 16, 1992 through December 31, 1992 (Categories 340/640) shall be charged against those levels of restraint to the extent of any unfilled balances. In the event the limits established for those periods have been exhausted by previous entries, such goods shall be subject to the levels set forth in this directive.

The limits set forth above are subject to adjustment in the future pursuant to the provisions of the MOU's dated June 26, 1992 and October 30, 1992 between the Governments of the United States and Guatemala.

Additionally, pursuant to the MOUs dated June 26, 1992 and October 30, 1992; and the terms of the Special Access Program, as set forth in 51 FR 21208 (June 11, 1986), 52 FR 26057 (July 10, 1987) and 54 FR 50425 (December 6, 1989), effective on January 1, 1993, guaranteed access levels are being established for properly certified textile products assembled in Guatemala from fabric formed and cut in the United States in the following categories which are re-exported to the United States from Guatemala during the period January 1, 1993 through December 31, 1993:

Category	Guaranteed access level
340/640	520,000 dozen.
448	42,000 dozen.

Any shipment for entry under the Special Access Program which is not accompanied by a valid and correct certification and Export Declaration in accordance with the provisions of the certification requirements established in the directive of January 24, 1990 shall be denied entry unless the Government of Guatemala authorizes the entry and any charges to the appropriate specific limit. Any shipment which is declared for entry under the Special Access Program but found not to qualify shall be denied entry into the United States.

In carrying out the above directions, the Commissioner of Customs should construe entry into the United States for consumption to include entry for consumption into the Commonwealth of Puerto Rico.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception of the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

Auggie D. Tantillo,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 92–30356 Filed 12–14–92; 8:45 am]

BILLING CODE 3510–DR–F

Amendment of Export Visa Requirements for Certain Cotton, Wool, Man-Made Fiber, Silk Blend and Other Vegetable Fiber Textiles and Textile Products Produced or Manufactured in Romania; Correction

December 9, 1992.

In a notice published in the **Federal Register** on November 17, 1992 (57 FR 54223), second column, third paragraph, line 37, change "December 16, 1992" to "December 17, 1992."

Auggie D. Tantillo,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 92–30354 Filed 12–14–92; 8:45 am]

BILLING CODE 3510–DR–F

DEPARTMENT OF DEFENSE

Office of the Secretary

Department of Defense Selection Criteria for Closing and Realigning Military Installations Inside the United States

AGENCY: Department of Defense (DoD).

ACTION: Notice of Final Selection Criteria.

SUMMARY: The Secretary of Defense, in accordance with Section 2903(b), Public Law 101–510, as amended, published in the February 15, 1991, **Federal Register** the Final Selection Criteria to be used in making recommendations for the closure and realignment of military installations inside the United States. These final criteria became effective on February 15, 1991. The final criteria published at that time will be used again, unchanged, by the Department of Defense to make recommendations that will be reviewed by the 1993 Defense Base Closure and Realignment Commission. This notice republishes those criteria.

FOR FURTHER INFORMATION CONTACT: Mr. Peter Potochney or Colonel Kirby Allen, OASD (P&L), (703) 697–8048.

SUPPLEMENTARY INFORMATION:

A. Final Selection Criteria

The final criteria to be used by the Department of Defense to make recommendations for the closure or realignment of military installations in accordance with Public Law 101–510, as amended, follow:

In selecting military installations for closure or realignment, the Department of Defense, giving priority consideration to military value (the first four criteria below), will consider:

Military Value

1. The current and future mission requirements and the impact on operational readiness of the Department of Defense's total force.

2. The availability and condition of land, facilities and associated airspace at both the existing and potential receiving locations.

3. The ability to accommodate contingency, mobilization, and future total force requirements at both the existing and potential receiving locations.

4. The cost and manpower implications.

Return on Investment

5. The extent and timing of potential costs and savings, including the number of years, beginning with the date of completion of the closure or realignment, for the savings to exceed the costs.

Impacts

6. The economic impact on communities.

7. The ability of both the existing and potential receiving communities' infrastructure to support forces, missions and personnel.

8. The environmental impact.

B. Background Information

The February 15, 1991 **Federal Register** notice contained an analysis of public comments received and a description of the changes DoD made to the proposed criteria published in a November 30, 1990 **Federal Register** Notice. DoD received 169 public comments in response to the proposed criteria and request for comments. The proposed criteria were appropriately amended based on these comments. The final criteria were accepted by Congress in 1991 and served well in the 1991 effort. They will therefore be used again, unchanged, by the Department of Defense to make recommendations to the 1993 Defense Base Closure and Realignment Commission.

C. Previous Federal Register References

(1) 55 FR 49679, November 30, 1990: Proposed selection criteria and request for comments.

(2) 55 FR 53536, December 31, 1990: Extend comment period on proposed selection criteria.

(3) 56 FR 6374, February 15, 1991: Publish selection criteria and analysis of comments.

Dated: December 11, 1992.

L.M. Bynum,

Alternate OSD Federal Register, Liaison Officer, Department of Defense.

[FR Doc. 92–30523 Filed 12–11–92; 2:35 pm]

BILLING CODE 3810–01–M

Department of the Air Force

USAF Scientific Advisory Board; Meeting

The USAF Scientific Advisory Board's Committee on IR Countermeasures and Self Defense Against IR Missiles will meet on 25–26 January 1993, at The ANSER Corporation, Crystal Gateway 3, 1215 Jefferson Davis Highway, Arlington, VA from 8 a.m. to 5 p.m.

The purpose of this meeting is to receive briefings and gather information relating to the study.

The meeting will be closed to the public in accordance with section 552b(c) of title 5, United States Code, specifically subparagraphs (1) and (4) thereof.

For further information, contact the Scientific Advisory Board Secretariat at (703) 697–4811.

Patsy J. Conner,

Air Force Federal Register Liaison Officer.

[FR Doc. 92–30319 Filed 12–14–92; 8:45 am]

BILLING CODE 3910–01–M

USAF Scientific Advisory Board; Meeting

The USAF Scientific Advisory Board (SAB) Ad Hoc Committee on Science and Technology will meet from 8 a.m. to 5 p.m. on 11 January 1993 at the Pentagon, Washington, D.C.

The purpose of this meeting is to present to the Principal Deputy Assistant Secretary for Acquisition the study final briefing. The meeting will be closed to the public in accordance with section 552b(c) of title 5, United States Code, specifically subparagraphs (1) and (4).

For further information, contact the SAB Secretariat at (703) 697–8404.

Patsy J. Conner,

Air Force Federal Register Liaison Officer.

[FR Doc. 92–30320 Filed 12–14–92; 8:45 am]

BILLING CODE 3910–01–M

Corps of Engineers, Department of the Army

Deauthorization of Water Resources Projects

December 2, 1992.

AGENCY: U.S. Army Corps of Engineers, DoD.

ACTION: Notice of project deauthorizations.

SUMMARY: The Corps of Engineers is publishing the lists of water resources projects and separable elements of projects deauthorized under the provisions of section 1001, Public Law 99–662, 33 U.S.C. 579a, and projects/separable elements not deauthorized due to obligations of funds or statutory continuations of authorization.

FOR FURTHER INFORMATION CONTACT: Mr. John Micik, Headquarters, U.S. Army Corps of Engineers, Attention: CECW–BA, Washington, DC 20314–1000. Tel. (202) 272–0705.

SUPPLEMENTARY INFORMATION: The Water Resources Development Act of 1986, Public Law 99–662, as amended, contains two provisions for the deauthorization of water resource projects or separable elements of projects. Section 1001(a), 33 U.S.C. 579a(a), requires the deauthorization of projects authorized in 1986, and thereafter, when five years have elapsed from the date of authorization without obligations of funds for planning, design or construction. Section 1001(b)(2), 33 U.S.C. 579a(b)(2), requires the Secretary of the Army to submit to the Congress a biennial list of unconstructed water resources projects, or separable elements of projects, which have had no obligations of funds for planning, design

or construction during the prior ten full fiscal years. If no funds are obligated within thirty months from the date the list is submitted, the project/separable element is deauthorized. Notwithstanding these provisions, project authorizations may be specifically continued by law.

For purposes of the Water Resources Development Act of 1986, "separable element" is defined in section 103(f), Public Law 99–662, 33 U.S.C. 2213(f).

In accordance with section 1001(b)(2), the Assistant Secretary of the Army (Civil Works) submitted a list of 30 projects/separable elements to Congress on January 18, 1990. From this list, 24 project/separable elements were deauthorized on July 19, 1992, and 6 were removed due to obligations of funds.

Eight project authorizations have been continued by law. The Energy and Water Development Appropriations Act, 1992, Public Law 102–104, August 17, 1991, 105 Stat. 510, and the Intermodal Surface Transportation Efficiency Act of 1991, Public Law 102–240, December 18, 1991, 105 Stat. 1914, each continued one; and the Water Resources Development Act of 1992, Public Law 102–580, October 31, 1992, 106 Stat, 4796, continued six.

Authority: This notice is required by the Water Resources Development Act of 1986, Pub. L. 99–662 section 1001(c), 33 U.S.C. 579a(c), and the Water Resources Development Act of 1988, Pub. L. 100–676, section 52(e), 102 Stat. 4045.

Dated: December 2, 1992.

Nancy P. Dorn,

Assistant Secretary of the Army (Civil Works).

PROJECTS DEAUTHORIZED ON 18 NOV 91 BY SECTION 1001 (A) OF PUBLIC LAW 99–662

District	Project name	Primary state	Purpose
NPA	Allison Lake (Valdez Hydropower)	AK	MP
NPA	Scammon Bay	AK	MP
POD	Rainmaker Hotel, American Samoa	AS	N
SPL	Harbor Office, Morro Bay	CA	N
SPN	Noyo Harbor, Mendocino	CA	N
SPL	Sunset Harbor	CA	N
POD	Saipan Harbor, Northern Marianas	CM	N
SAJ	Charlotte County	FL	BE
NCR	Davenport (Nahant Marsh)	IA	FC
NCC	Wilmington Ice Control Demonstration	IL	FC
SWT	Pearson-Skubitz, Big Hill Lake (Access Road)	KS	FC
NED	Merrimack River between Lowell and Lawrence	MA	N
NED	Neponset River	MA	N
NCE	Swan Creek Harbor of Refuge	MI	N
NCR	Albert Lea Lake	MN	FC
NCE	Duluth Shoreline (Sky Harbor Airport)	MN	BE
NCR	Schuyler County	MO	FC
LMK	Vicksburg Harbor	MS	N
MRO	Milk River, Havre	MT	FC
NCS	Grafton	ND	FC
NAP	Cape May Point	NJ	BE
NAP	Hereford Inlet and Five Mile Beach	NJ	BE
NCB	Buffalo Harbor Drift Removal	NY	N
NCB	Buffalo Ship Canal	NY	N
NCB	Dunkirk Harbor	NY	N
NAB	Endicott, Johnson City and Vestal (Remedial)	NY	FC
NPP	Blue River Powerhouse	OR	MP
NPP	Yaquina South Jetty	OR	N
NAB	Curwensville Lake (Water Line)	PA	FC
NAB	Marsh Creek Bridge, F.J. Sayers Dam	PA	FC
NAP	Pottstown (Schuylkill River Basin)	PA	FC
NAB	Susquehanna River, Sunbury Closure Structure	PA	FC
NED	Gorton's Pond, Warwick	RI	N
MRO	Lake Herman (Dredging)	SD	FC
MRO	Upper Missouri River Streambank Erosion	SD	FC
SWF	Lewisville Lake, Cottonwood Bridge	TX	FC
NAO	Hampton Roads Debris Removal	VA	N
	Total: 37		

PROJECTS SEPARABLE ELEMENTS DEAUTHORIZED ON 19 JULY 92 BY SECTION 1001(B)(2) OF PUBLIC LAW 99–662

District	Project name	Primary state	Purpose
SPL	Gila Riv & Tribs Downstream from Painted Rock Res	AZ	FC
SPL	San Diego, Sunset Cliffs (Segment A)	CA	BE
NAP	Mispillion River, Kent and Sussex County (1954 Act)	DE	N
SAJ	Palm Beach to Lake Worth Inlet (1950 Act)	FL	BE
POD	Waikiki Beach, Oahu	HI	BE
ORL	Russell and Allison Leves (1938 Act)	IL	FC
ORL	Downeyville Lake (1968 Act)	IN	FC
ORL	Evansville, Howell (Section 2)	IN	FC
ORL	Frankfort, Benson Creek	KY	FC
ORH	Kehoe Lake	KY	FC
NAP	Double Creek	NJ	N
NAP	Island Beach Inlet	NJ	N
NAP	Tocks Island Lake (1962 Act)	NJ	MP
SWA	Pecos River At Carlsbad	NM	FC
NAN	East Chester Creek (1950 Act)	NY	N

PROJECTS SEPARABLE ELEMENTS DEAUTHORIZED ON 19 JULY 92 BY SECTION 1001(B)(2) OF PUBLIC LAW 99–662—Continued

District	Project name	Primary state	Purpose
NAN	Shooters Island	NY	N
SWT	Tuskahoma Lake (1962 Act)	OK	FC
NAP	Darby-Cobbs Creek	PA	FC
NAP	Delaware River and Tribs, Drift Removal	PA	N
NCB	Elk Creek Harbor	PA	N
NAP	Tocks Island Lake, Route 209 Relocation (1962 Act)	PA	MP
SWF	Carl L. Estes Lake (1970 Act)	TX	FC
SWF	Clopton Crossing Lake	TX	FC
SWG	Giww, Harbor of Refuge at Seadrift	TX	N
Total: 24			

PROJECTS/SEPARABLE ELEMENTS REMOVED FROM DEAUTHORIZATION LIST IN ACCORDANCE WITH SECTION 1001(B)(2) OF PUBLIC LAW 99–662 DUE TO OBLIGATIONS OF FUNDS

District	Project name	Primary state	Purpose
SPK	Marysville Lake	CA	MP
ORL	Indianapolis, Warfleigh	IN	FC
NAN	Fire Island Inlet—Jones Inlet	NY	BE
NCB	Cleveland Harbor (Uncompleted Portion)	OH	N
ORP	Chartiers Creek, Cannonsburg-Houston Reach, Unit 2B	PA	FC
NAO	Virginia Beach (Groins)	VA	BE
	Total: 6		

PROJECT AUTHORIZATIONS CONTINUED BY LAW

[Original Authorization in Parentheses]

District	Project name	Primary state	Purpose
Section 101, P.L. 102–104, 17 Aug 91:			
SAM	Coosa River Channel, Gadsden, AL, to Rome, GA (1945)	AL	N
Section 1085, P.L. 102–240, 18 Dec 91:			
NED	Providence, Seekonk River, India Point Bridge (1986)	RI	N
Section 115, P.L. 102–580, 31 Oct 92:			
NCR	Green Bay Levee and Drainage District No. 2 (1986)	IA	FC
LMN	Lake Pontchartrain, North Shore (1986)	LA	FC
LMM	St. Johns Bayou and New Madrid Floodway (1986)	MO	FC
NAN	Deal Lake, Monmouth County (1986)	NJ	FC
NAB	Tyrone (1944)	PA	FC
SWT	Big Pine Lake (1962)	TX	FC
	Total: 8		

LMV *Lower Mississippi Valley Division*
LMM Memphis District
LMN New Orleans District
LMS St. Louis District
LMK Vicksburg District
MRD *Missouri River Division*
MRK Kansas City District
MRO Omaha District
NED *New England Division*
NAD *North Atlantic Division*
NAB Baltimore District
NAN New York District
NAO Norfolk District
NAP Philadelphia District
NCD *North Central Division*
NCB Buffalo District
NCC Chicago District
NCE Detroit District
NCR Rock Island District
NCS St. Paul District
NPD *North Pacific Division*
NPA Alaska District
NPP Portland District
NPS Seattle District
NPW Walla Walla District
ORD *Ohio River Division*
ORH Huntington District
ORL Louisville District
ORN Nashville District
ORP Pittsburgh District
POD *Pacific Ocean Division*
SAD *South Atlantic Division*
SAC Charleston District
SAJ Jacksonville District
SAM Mobile District
SAS Savannah District
SAW Wilmington District
SPD *South Pacific Division*
SPL Los Angeles District
SPK Sacramento District
SPN San Francisco District
SWD *Southwestern Division*
SWA Albuquerque District
SWF Fort Worth District
SWG Galveston District
SWL Little Rock District
SWT Tulsa District

Purpose
N Navigation
BE Beach Erosion Control
FC Flood Control
MP Multiple Purpose Power

[FR Doc. 92–30389 Filed 12–14–92; 8:45 am]
BILLING CODE 3710–92–M

DEPARTMENT OF EDUCATION

[CFDA No.: 84.030]

Clearinghouses for Individuals With Disabilities

ACTION: Correction notice.

SUMMARY: On August 18, 1992, a notice inviting applications for Fiscal Year 1993 was published at 57 FR 37360. The amounts indicated under available

funds in the chart as published are now being corrected to reflect final appropriations action. The correct amount of available funds for the National Information Center is $1,030,000; the Postsecondary Clearinghouse is $515,000; and the Special Education Employment Clearinghouse is $605,000.

FOR FURTHER INFORMATION CONTACT: Max Mueller, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, DC 20202–2651. Telephone: (202) 502–9554. Deaf and hearing impaired individuals may call (202) 205–9999 for TDD services.

Program Authority: 20 U.S.C. 1433.

Robert R. Davila,

Assistant Secretary, Office of Special Education and Rehabilitative Services.

[FR Doc. 92–30342 Filed 12–14–92; 8:45 am]

BILLING CODE 4000–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PL93–2–000]

Prior Notice and Filing Requirements Under Part II of the Federal Power Act; Technical Conference and Request for Comments

December 9, 1992.

Introduction

In a number of recent orders originating with *Central Maine Power Company*, 56 FERC ¶ 61,200, *reh'g denied*, 57 FERC ¶ 61,083 (1991) (*Central Maine*), the Commission has directed the payment of refunds for the late filing by public utilities of rates, charges, and related agreements for jurisdictional service. The Commission has ordered refunds in an effort to enforce the requirement of section 205 of the Federal Power Act (FPA), 16 U.S.C. 824d (1988), and the Commission's implementing regulations, 18 CFR part 35, that public utilities file rates and charges for jurisdictional service, and all contracts and agreements relating to such service, at least 60 days in advance of the commencement of jurisdictional service. The Commission also has attempted to provide additional guidance as to when it is likely to grant waiver of the prior notice requirement.

Despite the Commission's efforts, considerable uncertainty apparently remains throughout the electric utility industry concerning the filing obligations of public utilities and the applicability of the *Central Maine* remedial policy to late filings. The Commission already has issued orders clarifying the obligation of utilities to file certain types of agreements—namely, service agreements under filed tariffs of general applicability and jurisdictional agreements providing for the payment of contributions in aid of construction (CIAC agreements). In response to these orders, utilities have requested additional guidance as to the need to file other types of agreements and the extent of the Commission's willingness to apply its *Central Maine* remedial policy.

On November 16, 1992, in response to pleadings by Consolidated Edison Company of New York, Inc. (Con Edison) and the Edison Electric Institute (EEI), the Commission deferred the close of an amnesty window for the late filing of jurisdictional CIAC agreements. *See Florida Power Corp.*, 61 FERC ¶ 61,244 (1992). The Commission stated that it late would address a number of generic filing-related issues raised by Con Edison and EEI, as well as their request that the Commission engage in a comprehensive and orderly review of the filing obligations of public utilities under the FPA, as clarified in *Central Maine* and subsequent orders.

To this end, the Commission hereby schedules a technical conference, to be held on January 28, 1993, to consider issues relating to the Commission's enforcement of the prior notice and filing requirement.

Background

A. Statutory/Regulatory Framework

Section 205(c) of the FPA, 16 U.S.C. 824d(c) (1988), requires that public utilities file with the Commission all rates and charges for jurisdictional sales and transmission service, as well as all agreements that affect or relate to such rates and charges. Section 205(d) of the FPA, 16 U.S.C. 824d(d) (1988), in turn requires that public utilities file all such rates, charges, and related agreements with the Commission at least 60 days in advance of the commencement of such service. Section 205(d) also permits the Commission to waive the 60-day prior notice requirement for good cause shown. *Id.* Part 35 of the Commission's regulations implement these statutory filing requirements. See 18 CFR 35.3(a), 35.11 (1992). *See generally Indiana and Michigan Electric Co.* v. *FPC*, 502 F.2d 336 (D.C. Cir. 1974) (concerning earlier version of section 205 of the FPA); *National Fuel Gas Supply Corp.* v. *FERC*, 899 F.2d 1244 (D.C. Cir. 1990) (construing analogous filing provisions of the Natural Gas Act).

The Commission has considerable discretion in finding good cause for waiver of the prior notice and filing requirement. *See, e.g., San Diego Gas & Electric Co.* v. *FERC*, 904 F.2d 727, 731 (D.C. Cir. 1990); *City of Girard* v. *FERC*, 790 F.2d 919, 925 (D.C. Cir. 1986). For years, the Commission routinely granted waiver when the parties to a proposed rate agreed on an effective date and when waiver was adjudged to be in the public interest. *See, e.g., PacifiCorp Electric Operations*, 59 FERC ¶ 61,090, *reh'g granted*, 60 FERC ¶ 61,293 (1992). In *Central Hudson Gas & Electric Corp.*, 60 FERC ¶ 61,106, *reh'g denied*, 61 FERC ¶ 61,089 (1992), the Commission provided new guidance to the electric utility industry concerning the circumstances under which the Commission will find good cause for waiver of the 60-day prior notice requirement. Among other things, the Commission stated that, absent extraordinary circumstances, it will not grant waiver of the notice requirement when an agreement for new service, that is not provided pursuant to an accepted contract or settlement, is filed on or after the date jurisdictional service has commenced.[1] *See also United Illuminating Co.*, 61 FERC ¶ 61,186 (1992).

B. The Central Maine Policy

In *Central Maine*, the Commission was presented with the filing of 14 separate agreements for the short-term sale of capacity and energy at negotiated, market-based rates after service under all of the agreements had terminated. The Commission accepted the 14 late-filed agreements and waived the 60-day prior notice requirement, but did so only on the condition that the filing utility file revised rates reflecting a 100 percent contribution to the fixed costs of the facilities used to provide service under the 14 agreements. The Commission further directed the utility to refund all revenues received under the agreements in excess of a 100 percent contribution to fixed costs, plus associated interest.

Expressing concern with the increasing number of rate filings made after the commencement of service,[2] the

[1] The Commission also stated in *Central Hudson* that a strong showing of good cause is necessary to justify waiver with respect to a rate increase not provided for in a contract or settlement on file with the Commission. On the other hand, waiver of the notice requirement generally will be appropriate when an uncontested filing has no rate impact, when a filing reduces rates or charges, or when a rate increase and its effective date are prescribed by a Commission-accepted contract or settlement.

[2] *See* 56 FERC at 61,817. In this regard, the Commission cited its orders in Nevada Power Co., 55 FERC ¶ 61,379 at 62,153 n.14 (1991), Central

Commission took the opportunity to announce a policy statement of industry-wide application concerning implementation of the 60-day prior notice requirement. The Commission stated that utilities "transacting under existing agreements" not on file with the Commission, in violation of the prior filing requirement of Part II of the FPA, would be afforded the opportunity to file such agreements within 60 days of publication of the order in the **Federal Register**. The Commission further stated in *Central Maine* that any utilities filing rates (cost-based or market-based) for ongoing services during the 60-day "amnesty window" (which expired on October 7, 1991), if otherwise just and reasonable, would be entitled to recover up to a 100 percent contribution to fixed costs.

The Commission continued that any utility filing rates for ongoing jurisdictional service after the close of the amnesty window would be entitled to receive no more than its variable operation and maintenance (O&M) expenses from the date of commencement of service until the date the Commission accepts such rates for filing. Any such utility would be required to refund any amounts collected in excess of the amounts ultimately allowed by the Commission (as well as interest calculated pursuant to 18 CFR 35.19a.

C. Application of the Central Maine Policy

In the past year, the Commission has applied its *"Central Maine* policy" in a number of cases involving the late filing of jurisdictional agreements after the commencement of service. In *PacifiCorp Electric Operations*, 58 FERC ¶ 61,283, *reh'g denied*, 60 FERC ¶ 61,292 (1992), *reh'g pending*, the Commission directed the refund of certain revenues because of the late filing of a jurisdictional transmission service agreement 13 years after the date of commencement of service under the agreement and one day after the close of the *Central Maine* amnesty window. In *Green Mountain Power Corp.*, 59 FERC ¶ 61,291, *reh'g denied*, 60 FERC ¶ 61,158, *order on compliance filing*, 61 FERC ¶ _____ (1992), the Commission directed the refund of certain revenues because of the late filing of two unit power sales agreements and a related capacity exchange agreement.[3]

In a series of three cases, the Commission directed the payment of refunds for the late filing of service agreements implementing service under tariffs of general applicability. *See Mississippi Power Co.*, 58 FERC ¶ 61,286 *reh'g granted*, 61 FERC ¶ 61.014 (1992); *New England Power Co.*, 59 FERC ¶ 61,253, *reh'g granted*, 61 FERC ¶ 61.015 (1992); *Central Power & Light Co. and West Texas Utilities Co.*, 60 FERC ¶ 61,211 *reh'g granted*, 61 FERC ¶ 61,065 (1992). The utilities claimed in these cases that they were providing service under tariffs that already had been filed with and accepted by the Commission and, accordingly, that the late filing of service agreements indicating only the names of new customers taking service under approved tariffs did not warrant the harsh "penalty" of refunds. Recognizing that this matter was not entirely free of doubt at the time of issuance of *Central Maine*, the Commission announced the adoption of an additional 30-day amnesty period. See *New England Power Co.*, 61 FERC ¶ 61,015 (1992). During this amnesty period, which expired on November 9, 1992, utilities were able to file service agreements implementing tariff service at previously-approved tariff rates to particular customers without risking *Central Maine*—type refunds. See also *New England Power Co.*, 61 FERC ¶ 61,123 (1992), *reh'g pending*.

In another line of *Central Maine* cases, the Commission directed the payment of refunds for the late filing of jurisdictional agreements providing for the customer payment of contributions in aid of construction (CIAC agreements). *See Florida Power Corp.*, 58 FERC ¶ 61,161 *reh'q denied*, 60 FERC ¶ 61,003 (1992); *see also Western Massachusetts Electric Co.*, 59 FERC ¶ 61,091, *reh'g denied*, 61 FERC ¶ _____ (1992); *Blackstone Valley Electric Co.*, Docket No. ER92–207–001 (unpublished letter order, issued June 26, 1992), *reh'g pending*. The Commission explained that the type of agreements at issue always has been considered jurisdictional and subject to the statutory requirement of prior notice and filing. Nevertheless, in an order issued on October 13, 1992, the Commission recognized that the matter was not entirely clear at the time of the close (on October 7, 1991) of the *Central Maine* amnesty window. Accordingly, the Commission announced the adoption of an additional 30-day amnesty period in which to file with the Commission any now-unfiled CIAC agreements under which jurisdictional service currently is, or has been, provided. *See Florida Power Corp.*, 61 FERC ¶ 61,063 (1992).

The amnesty window for unfiled CIAC agreements originally was scheduled to expire on November 18, 1992. On November 16, 1992, the Commission issued an order extending the amnesty deadline for the filing of CIAC agreements. See *Florida Power Corp*, 61 FERC ¶ 61,244 (1992). The Commission based that decision on the applications of the Edison Electric Institute (EEI) and Consolidated Edison Company of New York, Inc. (Con Edison) to "stay" the effectiveness of the October 13 *Florida Power* order.

In support, EEI and Con Edison expressed concern about the limited amount of time available in which to search files for potentially thousands of current and expired agreements that may involve CIAC payments and that may be jurisdictional. EEI also raised a number of questions concerning the filing obligations of its member utilities: whether utilities must search files for agreements dating back to the passage of the FPA; whether the *Central Maine* policy applies to agreements which already had terminated before issuance of the *Central Maine* decision; the scope of transactions considered to be jurisdictional; and the extent to which utilities may continue to rely on past advice from Commission Staff. EEI submitted that a more formal process, in which affected parties may present their views and the Commission may respond before files are searched and documents retrieved, is necessary in order to provide a reasonable and efficient approach to addressing the concerns raised by *Central Maine* and related orders.

Some of the issues raised by EEI have been presented to the Commission in the context of individual filings currently awaiting action. In *Massachusetts Electric Co.*, 61 FERC ¶ _____(1992), the Commission explicitly deferred action on whether the remedial *Central Maine* policy should apply to the late filing of jurisdictional agreements that expired prior to the August 2, 1991 issuance of the original *Central Maine* order, as well as whether that policy should apply to the late filing of borderline sales agreements.[4] Similarly, the Commission

Vermont Public Service Corp., 54 FERC ¶ 61,153 at 61,484–85 (1991), and Portland General Exchange, Inc., 51 FERC ¶ 61,108 at 61,246 n.67 (1990).

[3] The Commission also has refused to apply its *Central Maine* policy to the filing of rates under jurisdictional sales and transmission agreements after the commencement of service under the agreements, when the Commission previously had evaluated the rates and reviewed the operative agreements in filings made by another party to the transaction. *See* Fale-Safe, Inc., 59 FERC ¶ 61,385 (1992).

[4] Borderline sales involve deliveries of power directly to a neighboring utility's retail customers along the electric franchise areas common to both.

Continued

has not yet acted on a petition for a declaratory order, filed by Portland General Electric Company (PGE) in Docket Nos. EL93–5–000, *et al.*, to remove a number of "uncertainties" concerning implementation of the Commission's *Central Maine* policy. These uncertainties include the applicability of the *Central Maine* policy to expired agreements. Finally, Central Maine itself has requested that the Commission reopen the original *Central Maine* proceeding and rescind its refund obligation in light of the Commission's decision in recent cases not to order refunds with respect to other late-filing utilities. See *New England Power Co.*, 61 FERC ¶ 61,123 (1992), *reh'g pending.*

Discussion

Central Maine's most recent filing brings us full circle with respect to implementation of our *Central Maine* policy. We had hoped that issuance of the original *Central Maine* order would clarify the need for compliance with the prior notice and filing requirement of the FPA and the Commission's implementing regulations. That hope was dashed by the number of filings made after the October 7, 1991 close of the *Central Maine* amnesty window, raising difficult jurisdictional and implementation issues. We further hoped that issuance of the additional amnesty windows concerning service agreements and jurisdictional CIAC agreements, as well as issuance of the *Central Hudson* order concerning waiver of notice, would resolve all remaining ambiguity concerning implementation of the prior notice and filing requirement and the applicability of the *Central Maine* remedial policy. That hope, too, proved short-lived.

As EEI and others now inform us, substantial uncertainty remains concerning the obligation of public utilities to file jurisdictional rates, charges, and related agreements for Commission consideration under the FPA and the *Central Maine* policy. Accordingly, after a year of experience with our *Central Maine* policy, and at the suggestion of EEI and some of its utility members, we believe it is appropriate to reexamine precisely how to proceed with respect to further implementation of our *Central Maine* policy.

In addition to EEI and individual public utilities that have formally raised *Central Maine*-related issues in filings before the Commission, other affected entities may have similar or additional arguments concerning the applicability of the *Central Maine* policy to unfiled rates, charges, and agreements for jurisdictional service. We believe it is appropriate to consider all of these arguments at one time, and then apply our conclusions to pending and future applications for Commission action in this area. Hopefully, this will allow us to achieve the intended purpose of the *Central Maine* policy, which was to add clarity and certainty to the filing obligations of public utilities, not to add further ambiguity. Careful consideration of any concerns related to our enforcement of the prior notice and filing requirement is especially important now, as the Commission begins to implement the Energy Policy Act of 1992, Public Law 102–486, 106 Stat. 2776 (1992), and continues to consider applications for approval of negotiated, market-based rates.

Accordingly, the Commission will hold a technical conference on these matters on January 28, 1993, at 10 a.m. in the Commission's meeting room, 9th Floor, 825 North Capitol Street, NE., Washington, DC 20426. The Commission invites public utilities and other interested entities, including state commissions and customers, to seek to participate in the conference and to submit written comments on issues concerning the Commission's enforcement of the prior notice and filing requirement. Issues may include, but are not limited to, the following:

1. What should be the extent of a utility's obligation to search its files for unfiled jurisdictional agreements? Should this obligation extend all the way back to the date of enactment of the FPA or some other date? How extensive a burden does this search obligation impose on public utilities?

2. On a related matter, should public utilities be obligated to file jurisdictional agreements that already have terminated by their terms? If the answer is no, what statutory basis would support such action? Should the *Central Maine* policy apply to jurisdictional agreements that had terminated by the August 2, 1991, issuance of the original *Central Maine* order? Did the industry read the language of the *Central Maine* policy as imposing only a "prospective" filing obligation?

3. What are the filing obligations of public utilities if uncertain as to the jurisdictional status of certain agreements at the time of execution and commencement of service thereunder? Can a utility rely on informal advice from Commission Staff, or must it file with the Commission and raise any arguments at that time?

4. How expansively should the Commission apply the amnesty windows for service agreements and jurisdictional CIAC agreements?

5. Have public utilities been afforded sufficient time in which to comply with their filing obligations under the remedial *Central Maine* policy? If not, how much time would be sufficient and why?

6. Are public utilities unable in particular circumstances to demonstrate good cause under the *Central Hudson* standard of "extraordinary circumstances" when seeking waiver of notice for agreements for short-term coordination service, not provided pursuant to an accepted contract or settlement, negotiated on short notice and filed after the commencement of service? Does the *Central Hudson* "extraordinary circumstances" standard have the practical effect of stifling short-term economy transactions that otherwise would benefit both the buyer and the seller? If so, what approaches should the Commission consider and how would such approaches ensure just and reasonable rates?

Participating entities should, to the extent possible, refrain from making comments that pertain to specific requests for Commission action in ongoing proceedings. To the extent that participating entities may have similar concerns, they are encouraged to file joint comments. Commentators should double space their comments, provide a concise description identifying the commentator, and use the same docket number as that contained in this notice. Written comments should not exceed 30 pages in length. In addition to written comments not exceeding 30 pages, commentators should also provide an executive summary of their written comments, not to exceed three pages. Comments (including an executive summary of comments) must be filed with the Commission's Office of the Secretary no later that January 11, 1993.

The Commission also invites interested persons to file requests to participate in the technical conference on these issues. Requests must be in writing and submitted to the Office of the Secretary no later than January 11, 1993. Persons with similar positions are requested to file joint requests for participation, so that the Commission can accommodate the maximum number of participants possible. A list of persons granted requests to participate in the technical conference will be available in the Commission's Office of Public Information prior to the date of the conference.

While the power is provided directly to the retail customer, the sale is to the neighboring utility within whose service territory the borderline loads are located.

While we are scheduling a technical conference on filing-related issues, nothing in this notice is intended to stay the effectiveness of the *Central Maine* policy or any of the *Central Maine* line of cases or otherwise relieve utilities of their obligation to file jurisdictional rates, charges, and related agreements in advance of the commencement of service.

The Commission Orders

(A) A technical conference to discuss issues concerning the Commission's enforcement of the prior notice and filing requirement and implementation of its *Central Maine* policy is hereby scheduled for 10 a.m. in the Commission's meeting room, 9th Floor, 825 North Capitol Street, NE., Washington, DC 20426 on January 28, 1993.

(B) Entities that wish to file comments are hereby directed to file such comments with the Secretary, as explained in the body of this notice, by January 11, 1993.

(C) Entities that wish to participate in the technical conference scheduled in Ordering Paragraph (A) are hereby directed to file a request with the Secretary, as explained in the body of this notice, by January 11, 1993.

(D) The Secretary shall promptly publish a copy of this notice in the **Federal Register.**

By direction of the Commission.

Lois D. Cashell,

Secretary.

[FR Doc. 92-30403 Filed 12-14-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. CP92-580-001, et al.]

El Paso Natural Gas Company, et al.; Natural Gas Certificate Filings

Take notice that the following filings have been made with the Commission:

1. EL Paso Natural Gas Company

[Docket No. CP92-580-001]

December 3, 1992.

Take notice that on November 27, 1992, EL Paso Natural Gas Company (Applicant), Post Office Box 1492, EL Paso, Texas 79978, filed in Docket No. CP92-580-001 pursuant to section 7(c) of the Natural Gas Act an amendment to its application in Docket No. CP92-580-000, in order to request authorization to eliminate from its original request certain compression and pipeline facilities, all as more fully set forth in the amendment which is on file with the Commission and open for public inspection.

Applicant states that on July 7, 1992, Applicant filed an application in Docket No. CP92-580-000 requesting authorization to construct and operate: (1) Compression facilities totalling 12,150 horsepower (HP) at the existing Wenden Compressor Station; (2) approximately 21.0 miles of 36-inch outside diameter (O.D.) loop pipeline; and approximately 93.5 miles of 30-inch O.D. pipeling, all at an approximate cost of $91.1 million. Applicant further states that this proposal is referred to as the Yuma Lateral Expansion Project which will link Applicant's existing interstate system to a point of interconnection with facilities to be sited at the International Boundary between the United States and the Republic of Mexico in Yuma County, Arizona, near San Luis Colorado, Sonora, Mexico.

Applicant indicates that the original application was to provide for firm and interruptible transportation service up to 400,000 Mcf per day of natural gas, primarily for shippers serving existing and proposed electric generation facilities in the Baja California Norte, Mexico, and existing and proposed electric generation facilities in Yuma, Arizona area.

Applicant proposes to delete from the facilities proposed in the original application filed July 7, 1992: (1) 6,500 HP from the originally proposed 12,150 HP at the existing Wenden Compressor Station; and (2) approximately 21.0 miles of 36-inch O.D. mainline loop pipeline downstream of the Wenden Compressor Station. Applicant states that the modifications results in a reduction in the project cost from approximately $91.9 million to $71.4 million, or $20.5 million.

Applicant indicates that the deletion of these facilities requires minor changes in the project in order to meet the revised pipeling operating conditions. Applicant indicates that the proposed metering stations have been changed to accommodate the revised flow and an existing compressor unit at the Wenden Compressor station will now be restaged.

Applicant states that, with these revisions, the optimum design of the expansion project could deliver the existing firm contract transportation demand of 1,210,000 Mcf per day of natural gas at the Mlythe Delivery Point located at the Arizona-California border and 348,000 Mcf per day of natural gas to the Yuma, Arizona/International boundary area.

Applicant states that it will not contract to provide new firm transportation services aggregating more than 348,000 Mcf per day through the new Yuma Lateral unless and until it has otherwise applied for an received additional, specific authorization from the Commission beyond that now being requested here to provide additional service.

Applicant proposes to construct and operate the following facilities as part of its Yuma Lateral Expansion Project:

Compression

1. Wenden Compressor Station

Install one (1) 5,650 ISO horsepower Solar Centaur "H" compressor unit, with appurtenances, at the existing Wenden Compressor Station located in La Paz County, Arizona.

Pipeline

2. California Lines to the United States Border

Install approximately 93.5 miles of 30-inch O.D. pipeline, with appurtenances, at milepost 714.6 on Applicant's existing 30-inch O.D. pipeline in La Pax County, Arizona, and terminating in Yuma County, Arizona.

Meter Stations

3. Yuma, Arizona

Install two (2) 6-inch standard orifice-type meter facilities, with appurtenances, at milepost 91.8 on Applicant's proposed 30-inch pipeline located in Yuma County, Arizona.

4. International Boundary

Install three (3) 16-inch standard orifice-type meter run, with appurtenances, at milepost 93.5 at the terminus of Applicant's proposed 30-inch pipeline located in Yuma County, Arizona.

Applicant indicates that it will construct and operate, under § 2.55(a) of the Commission's Statement of General Policy and Interpretations under the NGA the following facilities:

Compression

1. Wenden B Compressor Station

Restage one (1) compressor unit at the existing Wenden B Compressor Station located in La Paz County, Arizona.

Comment date: December 24, 1992, in accordance with the first subparagraph of Standard Paragraph F at the end of this notice.

2. Equitrans, Inc.

[Docket No. CP93-81-000]

December 3, 1992.

Take notice that on November 27, 1992, Equitrans, Inc. (Equitrans), 3500 Park Lane, Pittsburgh, PA 15275, filed in Docket No. CP93-81-000 a request pursuant to § 157.205 and § 157.211 of

the Commission's Regulations under the Natural Gas Act for authorization to construct and operate a sales tap, under the blanket certificate issued in Docket No. CP83–508–000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open for public inspection.

Equitrans proposes that the new sales tap be constructed on its transmission line in Franklin Township, Greene County, Pennsylvania to permit gas service to The State Correctional Institution of Franklin Township. Equitrans projects that the quantity of gas to be delivered through the new sales tap will be approximately 2,100 Mcf on a peak day.

Comment date: January 19, 1993, in accordance with Standard Paragraph G at the end of this notice.

3. Oryx Energy Company

[Docket No. CP93–85–000]

December 7, 1992.

Take notice that on December 1, 1992, Oryx Energy Company (Oryx), P.O. Box 2880, Dallas, Texas 75221–2880 filed in Docket No. CP93–85–000 a petition pursuant to Rule 207(a)(2) of the Commission's Rules of Practice and Procedure (18 CFR 385.207(a)(2)) for a declaratory order stating that the Commission has no jurisdiction over the services and facilities that Oryx intends to perform or acquire in Alfalfa and Grant Counties, Oklahoma, all as more fully set forth in the petition which is on file with the Commission and open to public inspection.

Oryx states that it has agreed to purchase facilities currently owned by Williams Natural Gas Company (WNG) known as the Wakita/Clyde Gathering System. Oryx submits that the services and facilities to be performed or acquired by Oryx fall within the definition of gathering facilities and are, therefore, excluded from the Commission's jurisdiction under section 1(b) of the Natural Gas Act.

The portion of the Wakita/Clyde Gathering System covered by the petition consists of approximately 70.4 miles of pipeline. Oryx states that all portions of the Wakita/Clyde Gathering System are located behind a processing facility known as the Wakita Plant (also sometimes referred to as West Hawley) which is owned by Oryx.

Oryx states that WNG provided natural gas service to two domestic customers at two taps located on the Wakita/Clyde Gathering System. Oryx states that they will assume WNG's obligations to provide a service to these domestic users and states an intent to convert the service to propane.

WNG has filed in Docket No. CP92–711–000 for authorization to abandon the subject facilities by sale to Oryx. Oryx requests that its petition be consolidated with WNG's application.

Comment date: January 6, 1993, in accordance with the first subparagraph of Standard Paragraph F at the end of this notice.

4. ANR Pipeline Company

[Docket No. CP93–86–000]

December 7, 1992.

Take notice that on December 2, 1992, ANR Pipeline Company (ANR), 500 Renaissance Center, Detroit, Michigan 48243, filed in Docket No. CP93–86–000 a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to operate under the provisions of Section 7 of the Natural Gas Act certain facilities that have been constructed pursuant to section 311 of the Natural Gas Policy Act of 1978, under ANR's blanket certificate issued in Docket No. CP82–480–000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the application on file with the Commission and open to public inspection.

ANR states that it constructed the Springboro metering facilities, located in Warren County, Ohio, pursuant to Section 311 of the NGPA to deliver gas to Cincinnati Gas and Electric. ANR asserts that it is requesting certificate authorization for these facilities so that any shipper may use the facilities when capacity is available.

Comment date: January 21, 1993, in accordance with Standard Paragraph G at the end of this notice.

5. Mid Louisiana Gas Company North Louisiana Gathering Company

[Docket No. CP93–79–000]

December 7, 1992.

Take notice that on November 25, 1992, Mid Louisiana Gas Company (Mid Louisiana), and North Louisiana Gathering Company (North Louisiana Gathering), both of P.O. Box 61865, Houston, Texas 77208–1865, filed in Docket No. CP93–79–000, a joint application pursuant to section 7(b) of the Natural Gas Act and Rule 207(a)(2) of the Commission's Rules of Practice and Procedure (18 CFR 385.207(a)(2), seeking authorization for Mid Louisiana to abandon all of its certificated gathering facilities which will be transferred to North Louisiana Gathering after the abandonment and petitioning the Commission to determine that the gathering facilities will not be subject to the Commission's Regulations pursuant to section 1(b) of the Natural Gas Act after the abandonment and transfer of the facilities to North Louisiana Gathering, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Mid Louisiana states that it would abandon and transfer to North Louisiana Gathering, all of its gathering facilities located in the Monroe Field in Louisiana. The facilities consist of nine field compressors and approximately 430 miles of gathering line, ranging in diameter from 1.25 inches to 22 inches, it is stated.

Mid Louisiana and North Louisiana Gathering request that the authorization which they seek be made effective the earlier of April 30, 1993, or the date the Commission permits Mid Louisiana's compliance filing in Docket No. RS92–20–000 to become effective.

North Louisiana asserts that upon acquisition of the facilities, it will provide its services to all persons on terms and conditions that are consistent with open-access principles and that gathering services would be available on a nondiscriminatory basis.

Comment date: December 28, 1992, in accordance with Standard Paragraph F at the end of this notice.

Standard Paragraphs

F. Any person desiring to be heard or make any protest with reference to said file with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE, Washington, DC 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to jurisdiction conferred upon the Federal Energy Regulatory Commission by sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this filing if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate is required by the public

convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for the applicant to appear or be represented at the hearing.

G. Any person or the Commission's staff may, within 45 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the Natural Gas Act.

Lois D. Cashell,

Secretary.

[FR Doc. 92–30331 Filed 12–14–92; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. JD93–01373T Arkansas-4]

State of Arkansas; NGPA Notice of Determination by Jurisdictional Agency Designating Tight Formation

December 8, 1992.

Take notice that on December 3, 1992, the Arkansas Oil and Gas Commission (Arkansas) submitted the above-referenced notice of determination pursuant to § 271.703(c)(3) of the Commission's regulations, that a portion of the Haynesville Formation, Springhill Field, Columbia County, Arkansas, qualifies as a tight formation under section 107(b) of the Natural Gas Policy Act of 1978. The area of application is described as the Fractional Section 12, Township 20 South, Range 23 West; the S/2 of Sections 1–3 and Fractional Sections 7–12, Township 20 South, Range 22 West, and Fractional Section 7, Township 20 South, Range 21 West, Columbia County, Arkansas.

The notice of determination also contains Arkansas' findings that the referenced portion of the Haynesville Formation meets the requirements of the Commission's regulations set forth in 18 CFR part 271.

The application for determination is available for inspection, except for material which is confidential under 18 CFR 275.206, at the Federal Energy Regulatory Commission, 825 North Capitol Street, NE, Washington, DC 20426. Persons objecting to the determination may file a protest, in accordance with 18 CFR 275.203 and 275.204, within 20 days after the date this notice is issued by the Commission.

Lois D. Cashell,

Secretary.

[FR Doc. 92–30336 Filed 12–14–92; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. CP93–92–000]

Arkla Energy Resources, a Division of Arkla, Inc.; Application

December 9, 1992.

Take notice that on December 4, 1992, Arkla Energy Resources, a division of Arkla, Inc. (AER), P.O. Box 21734, Shreveport, Louisiana 71151, filed in Docket No. CP93–92–000 an application pursuant to section 7(b) of the Natural Gas Act for authorization to abandon by sale to Bayou South Gas Gathering Company, L.C. (Bayou South) certain existing certificated pipeline facilities and facilities appurtenant thereto in Texas and Louisiana, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Specifically, AER proposes to abandon and transfer to Bayou South the following facilities:

(1) 114 feet of AER's Line ST–4 located in Webster Parish, Louisiana;

(2) 1,325 feet of Line LT–3 and Line LT–4 (approximately 25,492 feet) located in Claiborne Parish, Louisiana; and

(3) Line AT–2 (approximately 970 feet) located in Marion County, Texas.

AER states that, pursuant to an agreement with Bayou South, it has transferred to Bayou South gathering facilities in the same areas and upon receipt of the requested abandonment authority, will transfer these pipeline segments to Bayou South. AER states that abandonment would not impair services from the abandoned facilities and Bayou South would continue to gather and deliver gas from the connected fields through the facilities. It is also indicated that there would be no effect on AER's existing tariffs and AER's customers would benefit from the resulting reduction in AER's operating and maintenance costs and rate base.

Any person desiring to be heard or to make any protest with reference to said application should on or before December 30, 1992, file with the Federal Energy Regulatory Commission, Washington, DC 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this application if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that permission and approval for the proposed abandonment are required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for AER to appear or be represented at the hearing.

Lois D. Cashell,

Secretary.

[FR Doc. 92–30396 Filed 12–14–92; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP90–81–000, et al.]

El Paso Natural Gas Co.; Settlement Conference

December 9, 1992.

In the matter of Docket Nos. RP90–81–000, RP88–184–000, RP89–132–000, RP91–26–000, RP91–162–000, and RP92–18–000.

Take notice that a settlement conference will be convened in this proceeding on Friday, December 18, 1992, at 8 a.m., at the offices of the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., room 2402–A, Washington, DC, for the purpose of exploring the possible settlement of the above-referenced docket.

All parties, as defined by 18 CFR 385.102(c), and all participants, as

defined by 18 CFR 385.102(b), are invited to attend. Persons wishing to become parties must move to intervene and receive intervenor status pursuant to the Commission's regulations, 18 CFR 385.214.

For additional information, contact John Katz at (202) 208–0688 or Marc G. Denkinger at (202) 208–2215.

Lois D. Cashell,

Secretary.

[FR Doc. 92–30400 Filed 12–14–92; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RS92–60–000]

El Paso Natural Gas Co.; Notice of Pre-Filing Conference

December 8, 1992.

Take notice that on Friday, December 18, 1992, a pre-filing conference will be convened in the captioned docket to discuss El Paso Natural Gas Company's summary of its proposed plan for implementation of Order No. 636. The conference will be held in Hearing Room #1 of the Federal Energy Regulatory Commission, at 810 First Street, NE., Washington, DC. The conference will begin at 10 a.m. All interested persons are invited to attend. Attendance at the conference, however, will not confer party status. For additional information, interested parties can call Lisa T. Long at (202) 208–2105.

Lois D. Cashell,

Secretary.

[FR Doc. 92–30338 Filed 12–14–92; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. CP93–82–000]

Equitrans, Inc.; Notice of Request Under Blanket Authorization

December 8, 1992.

Take notice that on November 27, 1992, Equitrans, Inc. (Equitrans), 3500 Park Lane, Pittsburgh, Pennsylvania 15275, filed in Docket No. CP93–82–000 a request pursuant to § 157.205 and § 157.211 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205 and 157.211) for authorization to construct and operate a sales tap to permit deliveries to Equitable Gas Company (Equitable) for service to Mr. Charles E. Gaston, of Weston, West Virginia, under the blanket certificate issued in Docket No. CP83–508–000, as later transferred to Equitrans in Docket No. CP86–676–000, pursuant to section 7(c) of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Equitrans proposes to construct and operate a sales tap to be installed on its transmission line F–783 in Weston, West Virginia. It is indicated that the tap would be installed to permit gas service to Mr. Charles E. Gaston. It is also indicated that the customer would be served by Equitable and Equitable would be charged the applicable rate contained in Equitrans' FERC tariff. Equitrans projects that the quantity of gas to be delivered through the proposed sales tap would be approximately one Mcf on a peak day.

Equitrans states that the volumes to be delivered are within the certified entitlements of Equitable and that Equitrans' certificate does not prohibit the addition of new delivery points.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the Natural Gas Act.

Lois D. Cashell,

Secretary.

[FR Doc. 92–30335 Filed 12–14–92; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. CP85–221–009]

Frontier Gas Storage Co.; Notice of Sale Pursuant to Settlement Agreement

December 8, 1992.

Take notice that on December 1, 1992, Frontier Gas Storage Company (Frontier), % Reid & Priest, Market Square, 701 Pennsylvania Avenue, NW. Washington, DC 20004, in compliance with the provisions of the Commission's February 13, 1985 Order in Docket No. CP82–487–000 et. al., submitted an executed Service Agreement under Rate Schedule LVS–1 providing for the possible sale of up to 1 Bcf of Frontier's gas storage inventory on an "as metered" basis to UNIGAS Corporation (UNIGAS). The Service Agreement, dated November 30, 1992, contemplates the possible sale to commence December 16, 1992.

Under subpart (b) of Ordering Paragraph (F) of the Commission's February 13, 1985 Order, Frontier is "authorized to commence this sale of its inventory under such an executed service agreement fourteen days after the filing of the agreement with the Commission and may continue making such sale unless the Commission issues an order either requiring Frontier to stop selling and setting the matter for hearing or permitting the sale to continue and establishing other procedures for resolving the matter."

Any person desiring to be heard or to make a protest with reference to said tariff sheet filing should, on or before December 21, 1992, file with the Federal Energy Regulatory Commission (825 North Capitol Street, NE., Washington DC 20426) a motion to intervene or protest in accordance with the requirements of the Commission's Rules of Practice and Procedures, 18 CFR 385.214 or 385.211. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 92–30334 Filed 12–14–92; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP92–229–000]

Northwest Pipeline Corp.; Notice of Settlement Conference

December 8, 1992.

Pursuant to the Commission's order issued October 29, 1992 (61 FERC ¶ 61,126), an informal conference will be held to explore settlement of issues raised in the above-captioned proceeding. All parties should come prepared to discuss settlement, and the parties should be represented by principals who have the authority to commit to a settlement. The conference will be held on Thursday, January 14, 1993, at 10 a.m. in a room to be designated at the offices of the Federal Energy Regulatory Commission, 810 First Street, NE., Washington, DC 20426.

All interested persons and Staff and permitted to attend.

Lois D. Cashell,

Secretary.

[FR Doc. 92–30337 Filed 12–14–92; 8:45 am]

BILLING CODE 6717–01–M

[Docket Nos. CP92–79–004 and RP91–166–018]

Northwest Pipeline Corp.; Change in Service Agreements

December 9, 1992.

Take notice that on November 30, 1992, Northwest Pipeline Corporation (Northwest) tendered for filing and acceptance of new service agreements, as described below, in compliance with Commission directives in the above docket.

The purpose of this filing is to tender new Rate Schedule ODL–1 service agreements with various customers reflecting the partial conversion of sales services to transportation services, new service agreements under Rate Schedule SGS–1 reflecting the abandonment of SGS–1 (Option 10) Sales, and new LS–1 service agreements with various customers, which reflect the abandonment of Rate Schedule LS–1 Sales.

Northwest has requested an effective date of November 1, 1992 for the tendered service agreements.

Northwest states that copies of the filing is being served on the affected customers, all intervenors in Docket No. CP92–79 and associated state regulatory commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rule 211 of the Commission's Rules of Practice and Procedure 18 CFR 385.211. All such protests should be filed on or before December 16, 1992. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make Protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 92–30402 Filed 12–14–92; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP92–120–000]

Panhandle Eastern Pipe Line Co.; Informal Settlement Conference

December 9, 1992.

Take notice that an informal settlement conference will be convened in this proceeding on Tuesday, December 15, 1992, immediately following the prehearing conference scheduled at 9 a.m. The conference will be held at the offices of the Federal Energy Regulatory Commission, 810 First Street, NE., Washington, DC., for the purpose of exploring the possible settlement of all issues raised in the above-referenced docket.

Any party, as defined in 18 CFR 385.102(c) or any participant, as defined in 18 CFR 385.102(b) is invited to attend. Persons wishing to become a party must move to intervene and receive intervenor status pursuant to the Commission's regulations, 18 CFR 385.214.

For additional information, contact Carmen Gastilo at (202) 208–2182 or Joanne Leveque at (202) 208–5705.

Lois D. Cashell,

Secretary.

[FR Doc. 92–30397 Filed 12–14–92; 8:45 am]

BILLING CODE 6717–01–M

[Docket Nos. RP93–44–000]

Questar Pipeline Co.; Tariff Filing

December 9, 1992.

Take notice that Questar Pipeline Company, on December 7, 1992, tendered for filing and acceptance to be effective January 1, 1993, First Revised Sheet No. 40 and Original Sheet No. 40A to Original Volume No. 2–A of its FERC Gas Tariff.

Questar states that this filing revises section 5 of the General Terms and Conditions to Original Volume No. 2–A of its FERC Gas Tariff by adding tariff language that allows for the transfer of gas in place from one storage customer to another at Questar's Clay Basin storage reservoir.

Questar states further that this filing was served upon its Clay Basin storage customers and the Wyoming and Utah public service commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 385.211 and 385.214 of the Commission's Rules and Regulations 18 CFR 385.211 and 385.214. All such motions or protests should be filed on or before December 16, 1992. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 92–30398 Filed 12–14–92; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. ES93–15–000]

South Carolina Electric & Gas Co.; Notice of Application

December 8, 1992.

Take notice that on December 1, 1992, South Carolina Electric & Gas Company filed an application with the Federal Energy Regulatory Commission under section 204 of the Federal Power Act requesting authorization to issue not more than $200 million of unsecured promissory notes on or before December 31, 1994, with a final maturity date no later than December 31, 1995.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426 in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before December 24, 1992. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 92–30333 Filed 12–14–92; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP92–162–002]

Superior Offshore Pipeline Co., Motion to Place Tariff Sheets into Effect

December 9, 1992.

Take notice that on December 1, 1992, Superior Offshore Pipeline Company (SOPCO), respectfully moves to place into effect on December 1, 1992, subject to refund, its proposed rates submitted on April 29, 1992 that were suspended for the five-month statutory period by the Commission order dated June 26, 1992.

SOPCO states that on April 29, 1992, SOPCO submitted its Original Sheets No. 5 and 6 to its FERC Gas Tariff First Revised Volume No. 1. These sheets proposed base rates, plus the approved ACA charges, of $0.0321 and $0.0277 for transportation on SOPCO's system upstream and downstream of the Lowry Gas Plant, respectively. The Commission's June 26, 1992 order suspended the effectiveness of these filed-for rates until December 1, 1992.

SOPCO moves to place these proposed rates into effect December 1, 1992, the end of the suspension period. SOPCO states that the revised Tariff Sheet Nos. 5 and 6 which reflect the suspended rates and the current ACA charge as of October 1, 1992 are attached to the filing.

SOPCO states that copies of the filing have been served upon all of SOPCO's customers and each person designated on the official service list.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rule 211 of the Commission's Rules of Practice and Procedure 18 CFR 385.211. All such protests should be filed on or before December 16, 1992. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary

[FR Doc. 92–30401 Filed 12–14–92; 8:45 am]

BILLING CODE 6712–01–M

[Docket No. RP93–43–000]

Transcontinental Gas Pipe Line Corp.; Motion for Waivers and Request for Interim Authority

December 9, 1992.

Take notice that on December 3, 1992, Transcontinental Gas Pipe Line Corporation (TGPL) tendered for filing a request for waiver of § 284.223(f) of the Commission's regulations, and for authorization to waive certain provisions of its FERC Gas Tariff to the extent necessary to enable TGPL to convert certain firm transportation agreements with Conoco Inc. (Conoco) from service authorized under section 311 of the Natural Gas Policy Act of 1978 (NGPA) and subpart B of part 284 of the regulations to service under TGPL's blanket transportation certificate under section 7(c) of the Natural Gas Act (NGA) and subpart B of part 284.

TGPL seeks to convert the FT Agreements at the request of Conoco. With the issuance of the Commission's Order No. 636 series, Conoco seeks the greater flexibility available under the blanket certificate authorization in order to utilize more fully its firm capacity on TGPL and meet the needs expressed by Conoco's customers. TGPL requests a waiver of the requirement at § 284.223(f)(1)(ii) of the Commission's regulations that conversion from subpart B service to service under subpart G occur prior to November 1, 1990.

TGPL also requests, to the extent necessary, a waiver of § 8.1 of Rate Schedule FT of its tariff which requires TGPL to announce any new firm transportation capacity which comes available and to hold an open season for such capacity. TGPL seeks a waiver of its tariff to the extent necessary to permit it to convert Conoco's transportation to subpart G without first holding an open season. TGPL requests that the Commission expeditiously grant TGPL interim authority to transport gas for Conoco pursuant to subpart G pending approval of the instant request. TGPL submits that waiver of § 284.223(f) of the regulations should moot the need for any waiver of TGPL's tariff.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with 18 CFR 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before December 16, 1992. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the public reference room.

Lois D. Cashell,

Secretary.

[FR Doc. 92–30399 Filed 12–14–92; 8:45 am]

BILLING CODE 6717–01–M

ENVIRONMENTAL PROTECTION AGENCY

[OPPT–51812; FRL–4180–6]

Certain Chemicals; Premanufacture Notices

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Section 5(a)(1) of the Toxic Substances Control Act (TSCA) requires any person who intends to manufacture or import a new chemical substance to submit a premanufacture notice (PMN) to EPA at least 90 days before manufacture or import commences. Statutory requirements for section 5(a)(1) premanufacture notices are discussed in the final rule published in the Federal Register of May 13, 1983 (48 FR 21722). This notice announces receipt of 53 such PMNs and provides a summary of each.

DATES: Close of review periods:

P 93–127, 93–128, 93–129, 93–130, 93–131, 93–132, February 7, 1993.

P 93–133, 93–134, 93–135, February 9, 1993.

P 93–136, 93–137, February 10, 1993.

P 93–138, 93–139, 93–140, 93–141, 93–142, 93–143, 93–144, 93–145, 93–146, 93–147, 93–148, 93–149, February 13, 1993.

P 93–150, 93–151, 93–152, 93–153, 93–154, 93–156, 93–157, February 14, 1993.

P 93–158, 93–159, 93–160, 93–161, 93–162, February 15, 1993.

P 93–163, 93–164, 93–165, 93–166, 93–167, 93–168, 93–169, February 16, 1993.

P 93–170, 93–171, 93–172, February 17, 1993.

P 93–173, 93–174, 93–175, 93–176, 93–177, 93–178, 93–179, 93–180, February 20, 1993.

Written comments by:

P 93–127, 93–128, 93–129, 93–130, 93–131, 93–132, January 8, 1993.

P 93–133, 93–134, 93–135, January 10, 1993.

P 93–136, 93–137, January 11, 1993.

P 93–138, 93–139, 93–140, 93–141, 93–142, 93–143, 93–144, 93–145, 93–146, 93–147, 93–148, 93–149, January 14, 1993.

P 93–150, 93–151, 93–152, 93–153, 93–154, 93–156, 93–157, January 15, 1993.

P 93–158, 93–159, 93–160, 93–161, 93–162, January 16, 1993.

P 93–163, 93–164, 93–165, 93–166, 93–167, 93–168, 93–169, January 17, 1993.

P 93–170, 93–171, 93–172, January 18, 1993.

P 93–173, 93–174, 93–175, 93–176, 93–177, 93–178, 93–179, 93–180, January 21, 1993.

ADDRESSES: Written comments, identified by the document control number "(OPPT–51812)" and the specific number should be sent to: Document Processing Center (TS–790), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 401 M St., SW., Rm. 201ET, Washington, DC, 20460, (202) 260–3532.

FOR FURTHER INFORMATION CONTACT: Susan B. Hazen, Director, Environmental Assistance Division (TS–799), Office of Pollution Prevention and Toxics, Environmental Protection Agency, Rm. E–545, 401 M St., SW., Washington, DC, 20460 (202) 554–1404, TDD (202) 554–0551.

SUPPLEMENTARY INFORMATION: The following notice contains information extracted from the nonconfidential version of the submission provided by the manufacturer on the PMNs received by EPA. The complete nonconfidential document is available in the TSCA Public Docket Office, NE–G004 at the above address between 8 a.m. and noon and 1 p.m. and 4 p.m., Monday through Friday, excluding legal holidays.

P 93–127

Manufacturer. The C. P. Hall Company.

Chemical. (S) Hexanedioic acid dimethyl ester; pentanedioic aciddimethyl ester; 2-methyl-1,3-propanediol; 1,3-propanediol 2-ethyl-2-(hydroxymethyl).

Use/Production. (S) Intermediate for urethanes. Prod. range: Confidential

P 93–128

Manufacturer. Confidential.

Chemical. (G) Diamno disulfo naphthalene.

Use/Production. (S) Dye intermediate. Prod. range: Confidential.

P 93–129

Manufacturer. Confidential.

Chemical. (G) Substituted carboxylic acid, compound with diethylaminoethanol.

Use/Production. (S) Oxygen scavenger for boiler feedwater. Prod. range: Confidential.

Toxicity Data. Acute oral toxicity: LD50 > 5.0 g/kg species (rat). Acute dermal toxicity: LD50 > 2.0 g/kg species (rabbit). Eye irritation: none species (rabbit). Static acute toxicity: time LC50 48H > 1,000 mg/l species (Daphnia magna). Skin irritation: negligible species (rabbit).

P 93–130

Manufacturer. Confidential.

Chemical. (G) Diamino disulfo naphthalene.

Use/Production. (S) Dye intermediate. Prod. range: Confidential.

P 93–131

Manufacturer. Confidential.

Chemical. (G) Diazo coupled amino *J* acid.

Use/Production. (S) Dye intermediate. Prod. range: Confidential.

P 93–132

Manufacturer. Confidential.

Chemical. (G) Tris(diamino carbopolycycle)terrate(III).

Use/Production. (S) Anti-halation dye. Prod. range: Confidential.

P 93–133

Manufacturer. Confidential.

Chemical. (G) Modified diphenylmethane diisocyanate.

Use/Production. (G) Polyurethane coating component. Prod. range: Confidential.

P 93–134

Manufacturer. Confidential.

Chemical. (G) Unsaturated polyester resin.

Use/Production. (G) On-site maintenance. Prod. range: Confidential.

P 93–135

Importer. Confidential.

Chemical. (G) Polyoxyalkanes, alcohols C_{12-20} saturated and C_{18} unsaturated, ethoxylate reaction products with 1, 6-diisocyanato-2,4,4-trimethylhexane and 1,6-diisocyanato-2,4,4-trimethylhexane.

Use/Import. (G) Nondispersive thickener for plastic solutions. Import range: Confidential.

Toxicity Data. Acute oral toxicity: LD50 5,000 mg/kg species (rat). Mutagenicity: negative.

P 93–136

Manufacturer. Confidential.

Chemical. (G) Alkyl ester of oligomer.

Use/Production. (G) Resin for transparency. Prod. range: Confidential.

Toxicity Data. Acute oral toxicity: LD50 1,091 mg/kg species (rat). Skin irritation: slight.

P 93–137

Manufacturer. Dow Corning Corporation.

Chemical. (G) Crosslinked polydimethylsiloxane.

Use/Production. (S) Thermoclave pressure packing. Prod. range: Confidential.

P 93–138

Manufacturer. Confidential.

Chemical. (G) Propanenitrile, 3-(alkylene).

Use/Production. (S) Amine production. Prod. range: Confidential.

P 93–139

Manufacturer. Confidential.

Chemical. (G) 1-Propanamine, 3(alkyloxy).

Use/Production. (S) Precursor for amino propane nitrile production. Prod. range: Confidential.

P 93–140

Manufacturer. Confidential.

Chemical. (G) Propanenitrile, 3-amino-*N*-(alkyloxy)propyl).

Use/Production. (S) Precursor to propanediamine production. Prod. range: Confidential.

P 93–141

Manufacturer. Confidential.

Chemical. (G) 1,3-Propanediamine, *N*-(3-(alkoxy)propyl).

Use/Production. (S) Flotation reagent for use in mining. Prod. range: Confidential.

P 93–142

Manufacturer. Confidential.

Chemical. (G) 1,3-Propanediamine, *N*-(3-(alkyloxy)propyl),acetates.

Use/Production. (S) Flotation reagent for use in mining. Prod. range: Confidential.

P 93–143

Manufacturer. Confidential.

Chemical. (G) Alkoxylated diphenol.

Use/Production. (G) Chemical intermediate. Prod. range: Confidential.

P 93–144

Manufacturer. Confidential.

Chemical. (G) Alkoxylated diphenol.

Use/Production. (G) Chemical intermediate. Prod. range: Confidential.

P 93–145

Manufacturer. Confidential.

Chemical. (G) Polymeric diphenol.

Use/Production. (G) Chemical intermediate. Prod. range: Confidential.

P 93–146

Manufacturer. Bostik, Inc.

Chemical. (G) Polyamine.

Use/Production. (G) Open, nondispersive use. Prod. range: Confidential.

P 93–147

Importer. Confidential.

Chemical. (G) Ethyl carbazole violet.

Use/Import. (G) Pigment for colorants. Import range: Confidential.

P 93–148

Importer. Confidential.

Chemical. (G) Novolac-resin from substituted phenols and formaldehyde.

Use/Import. (G) A component of the material for IC fabrication. Import range: Confidential.

P 93–149

Importer. Confidential.

Chemical. (G) Ethylene-vinylacetates emulsion.

Use/Import. (S) Adhesive. Import range: Confidential.

P 93–150

Manufacturer. Confidential.

Chemical. (G) Isopthalic acid polymer with benzene sulfonic acid, dicarboxy, sodium salt, monoisopropanolamine, Alkyl glycol, and styrene/acrylic polymer.

Use/Production. (G) Additive for inks. Prod. range: Confidential.

P 93–151

Importer. Goldschmist Chemical Corporation.

Chemical. (G) Polyether modified polysiloxane.
Use/Import. (G) Open nondispersive. Import range: Confidential.

P 93–152

Manufacturer. E.I. Du Pont De Nemours and Company.
Chemical. (G) Substituted alkylated polyethylene.
Use/Production. (G) Belts and hoses. Prod. range: Confidential.

P 93–153

Manufacturer. Confidential.
Chemical. (G) Substituted phosphoramide.
Use/Production. (G) Isolated intermediate used to produce specialty additive. Prod. range: Confidential.

P 93–154

Manufacturer. Hoechst Celanese Corporation.
Chemical. (G) Azo substituted naphthalene sulfonic acid.
Use/Production. (S) Fiber reactive dye for textile dyeing. Prod. range: 2,500–10,000 kg/yr.

P 93–156

Manufacturer. Hoechst Celanese Corporation.
Chemical. (G) Disubstituted nitrobenzene.
Use/Production. (S) Captive intermediate. Prod. range: 15,000–35,000 kg/yr.

P 93–157

Importer. Confidential.
Chemical. (G) Di bacic/glycol ester.
Use/Import. (S) Product is a resinous constituent for use in food and beverage can coatings. Import range: Confidential.

P 93–158

Manufacturer. Minnesota Mining and Manufacturing Co.
Chemical. (S) *N*-Vinylpyrrolidone; 2-propenoic acid, 2-methoxyethyl ester; 2-propenoic acid, 2-methoxyethyl ester 2,propenoic acid, ammonium salt.
Use/Production. (G) Binder. Prod. range: Confidential.

P 93–159

Importer. Confidential.
Chemical. (G) Dibasic acid/glycol ester.
Use/Import. (G) Product is a resinous constituent for food and Beverage can linings. Import range: Confidential.

P 93–160

Manufacturer. Confidential.
Chemical. (G) Alkylcarbbamate.

P 93–161

Manufacturer. Confidential.
Chemical. (G) Amine phosphate.
Use/Production. (G) Contained use. Prod. range: Confidential.

P 93–162

Manufacturer. Confidential.
Chemical. (G) Aromatic polyether polyester.
Use/Production. (G) Epoxy resin ingredient. Prod. range: Confidential.

P 93–163

Manufacturer. Confidential.
Chemical. (G) Polyester polyurethane.
Use/Production. (G) Coating for open, nondispersive use in orginal equipment manufacture. Prod. range: Confidential.

P 93–164

Manufacturer. Confidential.
Chemical. (G) Modified diphenylmetthane diisocyanate.
Use/Production. (G) Polyurethane foam component. Prod. range: Confidential.

P 93–165

Manufacturer. Monsanto Company.
Chemical. (S) Hexanedioic acid, bis-*N*-hexyl, bis(cyclohexyl) esters ox mixed dihexyl, dicyclohexyl (hexyl, cycohexyl) adipates.
Use/Production. (G) Plasticizer. Prod. range: Confidential.
Toxicity Data. Acute oral toxicity: LD50 > 5,000 mg/kg species (rat). Acute dermal toxicity: LD50 > 5,000 mg/kg species (rabbit). Eye irritation: slight species (rabbit). Skin irritation: negligible species (rabbit).

P 93–166

Manufacturer. Confidential.
Chemical. (G) Crosslinked polymeric acrylic microparticles.
Use/Production. (S) Coatings. Prod. range: 208,506–625,000 kg/yr.

P 93–167

Manufacturer. Confidential.
Chemical. (G) Crosslinked polymeric acrylic microparticles.
Use/Production. (S) Coatings. Prod. range: 208,000–625,518 kg/yr.

P 93–168

Importer. Confidential.
Chemical. (S) Alcohols, C_{12-18}, ethers with polyethylene.
Use/Import. (S) Spin finish synthetic fiber. Import range: 500–2,000 kg/yr.

P 93–169

Manufacturer. Confidential.
Chemical. (G) Polyurethane elastomer.
Use/Production. (G) Engineering thermoplastic alloy material. Prod. range: Confidential.

P 93–170

Manufacturer. Confidential.
Chemical. (S) Functionalized polyester polyurethane dispersion.
Use/Production. (G) Component of spray applied coating. Prod. range: 50,000–150,000 kg/yr.

P 93–171

Manufacturer. Confidential.
Chemical. (G) Functionalized polyester polyurethane dispersion.
Use/Production. (G) Component of spray applied coating. Prod. range: 50,000–150,000 kg/yr.

P 93–172

Manufacturer. Confidential.
Chemical. (G) Functionalized polyester polyurethane dispersion.
Use/Production. (G) Component of spray applied coating. Prod. range: 50,000–150,000 kg/yr.

P 93–173

Manufacturer. Air Products and Chemicals, Inc.
Chemical. (S) 1-Chloromethyl-4-fluoro-1,4-diazoniabicycle(2,2,2)otane bis(tetrafluoroborate).
Use/Production. (G) Selective fluorination of organic and inorganic chemical substrates. Prod. range: Confidential.

P 93–174

Manufacturer. Air Products and Chemicals, Inc.
Chemical. (G) Substituted triethylenediamine chloride.
Use/Production. (G) An isolated but site-limited intermediate in the manufacture of chemical identified. Prod. range: Confidential.

P 93–175

Manufacturer. Air Products and Chemicals, Inc.
Chemical. (G) Substituted triethylenediamine fluoroborate.
Use/Production. (G) An isolated but site-limited intermediate in the manufacture of the chemical identified. Prod. range: Confidential.

P 93–176

Importer. Confidential.
Chemical. (G) Hyrophthalically modified polyurethane.
Use/Import. (G) Open, nondispersive. Import range: Confidential.
Toxicity Data. Acute oral toxicity: LD50 > 5,000 mg/kg species (rats). Acute dermal toxicity: LD50 > 2,000 mg/kg species (rabbit).

P 93–177

Manufacturer. Hoechst Celanese Corporation.
Chemical. (G) Substituted naphthalene sulfonic acid salt.
Use/Production. (S) Liquid and powder formulation of fiber reactive dye. Prod. range: 11,000–33,000 kg/yr.

P 93–178

Manufacturer. Bostik, Inc.

Chemical. (G) Polyurethane.

Use/Production. (G) Open, nondispersive use. Prod. range: Confidential.

P 93–179

Manufacturer. R.T. Vanderbilt Company, Inc.

Chemical. (G) 2,5-Dimercapto-1,3,4-thiadazole reaction product.

Use/Production. (S) Multifunctional additives for fuel and lubricants. Prod. range: Confidential.

P 93–180

Manufacturer. R.T. Vanderbilt Company, Inc.

Chemical. (G) 2,5-Dimercapto-1,3,4-thiadiazole reactin product.

Use/Production. (S) Multifunctional additives for fuel and lubricants. Prod. range: Confidential.

Dated: December 7, 1992.

Frank V. Caesar,

Acting Director, Information Management Division, Office of Toxic Substances.

[FR Doc. 92–30433 Filed 12–14–92; 8:45 am]

BILLING CODE 6560–50–F

[OPPT–59316; FRL–4180–9]

Certain Chemical; Test Market Exemption Application

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA may upon application exempt any personfrom the premanufacturing notification requirements of section5(a) or (b) of the Toxic Substance Control Act (TSCA) to permitthe person to manufacture or process a chemical for test marketing purposes under section 5(h)(1) of TSCA. Requirements for test marketing exemption (TME) applications, which must either be approved or denied within 45 days of receipt are discussed in EPA's final rule published in the Federal Register of May 13, 1983 (48 FR 21722). This notice, issued under section 5(h)(6) of TSCA, announces receipt of announces receipt of two application(s) for exemption, applications for exemption, provides a summary, and requests comments on the appropriateness of granting these exemptions.

DATES:

Written comments by:

T 93–4, 93–5, December 25, 1992.

ADDRESSES: Written comments, identified by the document control number "(OPPT–59316)" and the specific TME number should be sent to: Document Processing Center (TS–790), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 401 M St., SW, Rm. 201ET Washington, DC 20460, (202) 260–1532.

FOR FURTHER INFORMATION CONTACT: Susan B. Hazen,Director, Environmental Assistance Division (TS–799), Office of Pollution Prevention and Toxics, Environmental Protection Agency, Rm. E–545, 401 M St., SW, Washington, DC 20460, (202) 554–1404, TDD (202) 554–0551.

SUPPLEMENTARY INFORMATION: The following notice contains information extracted from the nonconfidential version of the submission provided by the manufacturer of the TME received by EPA. The complete nonconfidential document is available in the TSCA Public Docket Office NE–G004 at the above address between 8 a.m. and noon and 1 p.m., Monday through Friday, excluding legal holidays.

T 93–4

Close of Review Period. January 8, 1993.

Manufacturer. Confidential.

Chemical. (G) Alkanoate ester of an ammonium salt.

Use/Production. (G) Laundry additive. Prod. range: Confidential.

Toxicity Data. Acute oral toxicity: LD50 > 5.0 g/kg species (rat). Acute dermal toxicity: LD50 > 2.0 g/kg species (rat). Eye irritation: slight species (rabbit). Skin irritation: slight species (rabbit). Mutagenicity: negative. Skin sensitization: negative species (guinea pig).

T 93–5

Close of Review Period. January 8, 1993.

Manufacturer. Confidential.

Chemical. (G) Alkanoate ester of an ammonium salt.

Use/Production. (G) Laundry additive. Prod. range: Confidential.

Toxicity Data. Acute oral toxicity: LD50 >5.0 g/kg species (rat). Acute dermal toxicity: LD50 >2.0 g/kg species (rat). Eye irritation: slight species (rabbit). Skin irritation: slight species (rabbit). Mutagenicity: negative. Skin sensitization: negative species (guinea pig).

Dated: December 7, 1992.

Frank V. Caesar,

Acting Director, Information Management Division, Office of Pollution Prevention and Toxics.

[FR. Doc. 92–30438 Filed 12–14–92; 8:45 am]

BILLING CODE 6560–50–F

[OPPT–59955; FRL–4180–4]

Certain Chemicals; Premanufacture Notices

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Section 5(a)(1) of the Toxic Substances Control Act (TSCA) requires any person who intends to manufacture or import a new chemical substance to submit a premanufacture notice (PMN) to EPA at least 90 days before manufacture or import commences. Statutory requirements for section 5(a)(1) premanufacture notices are discussed in the final rule published in the Federal Register of May 13, 1983 (48 FR 21722). In the Federal Register of November 11, 1984, (49 FR 46066) (40 CFR 723.250), EPA published a rule which granted a limited exemption from certain PMN requirements for certain types of polymers. Notices for such polymers are reviewed by EPA within 21 days of receipt. This notice announces receipt of 13 such PMN(s) and provides a summary of each.

DATES: Close of review periods:

Y 93–10, November 22, 1992.

Y 93–11, November 26, 1992.

Y 93–12, November 29, 1992.

Y 93–13, 93–14, December 2, 1992.

Y 93–15, December 6, 1992.

Y 93–16, 93–17, 93–18, 93–19, December 7, 1992.

Y 93–20, December 9, 1992.

Y 93–21, 93–22, December 13, 1992.

FOR FURTHER INFORMATION CONTACT: Susan B. Hazen, Director, Environmental Assistance Division (TS–799), Office of Pollution Prevention and Toxics, Environmental Protection Agency, Rm. E–545, 401 M St., SW., Washington, DC, 20460 (202) 554–1404, TDD (202) 554–0551.

SUPPLEMENTARY INFORMATION: The following notice contains information extracted from the nonconfidential version of the submission provided by the manufacturer on the PMNs received by EPA. The complete nonconfidential document is available in the TSCA Public Docket Office, NE–G004 at the above address between 8 a.m. and noon and 1 p.m. and 4 p.m., Monday through Friday, excluding legal holidays.

Y 93–10

Manufacturer. Confidential.

Chemical. (G) Hydroxy functional acrylic polymer.

Use/Production. (S) Coatings. Prod. range: 15,000–45,000 kg/yr.

Y 93–11

Importer. Confidential.

Chemical. (G) Polymer of benzoic acid derivative, substituted biphenyl, substituted benzenes.

Use/Import. (S) Connector electric parts. Import range: Confidential.

Y 93–12

Manufacturer. Confidential.

Chemical. (G) Polyol.

Use/Production. (G) Manufacturing precursor. Prod. range: Confidential.

Y 93–13

Importer. Toyobo America, Inc.

Chemical. (S) 1,1'-Methylenedbis(4-isocyanatobenzene), polymer with 1,3-benzenedicarboxylic acid,1,4-benzenedicarboxylic acid, 2,2-dimethyl-1,-dimethyl-1,3-propanediol,1,2-ethanediol, and 5-sulfo-1,3-benzenedicarboxylic acid monosodium salt.

Use/Import. (S) Binder for magnetic tapes. Import range: Confidential.

Toxicity Data. Mutagenicity: negative.

Y 93–14

Importer. Toyobo American, Inc.

Chemical. (G) Polyester polyurethane with 5-sulfo-1,3-benzenedicarboxylic.

Use/Import. (S) Binder for magnetic tapes. Import range: Confidential.

Toxicity Data. Mutagenicity: negative.

Y 93–15

Manufacturer. Confidential.

Chemical. (G) Polyester resin.

Use/Production. (S) Clear and pigmented powder coatings. Prod. range: Confidential

Y 93–16

Manufacturer. Akzo-Lanchem.

Chemical. (G) Epoxy ester.

Use/Production. (S) Polymerized to manufacture inks. Prod. range: Confidential.

Y 93–17

Manufacturer. Confidential.

Chemical. (G) Styrene-acrylic copolymer.

Use/Production. (G) A component used in coatings for plastics. Prod. range: Confidential.

Y 93–18

Manufacturer. Reichhold Chemicals, Inc.

Chemical. (G) Polyester resin.

Use/Production. (S) Powder caotings. Prod. range: Confidential.

Y 93–19

Manufacturer. Reichhold Chemicals, Inc.

Chemical. (G) Polyester.

Use/Production. (S) Powder coatings. Prod. range: Confidential.

Y 93–20

Manufacturer. Henkel Corporation.

Chemical. (S) Nonanedioic acid and fatty acids, C_{4-11} di- polymer with 1,4 butanediol,1,2 propylene glycol, and (nonanedioic acid polymer with ethylene glycol), bishydroxyethyl nonanedioate, and ethylene glycol-, 2-ethyl hexyl ester.

Use/Production. (S) Plasticizer for polyvinyl chloride resin. Prod. range: 1,000,000–1,500,000 kg/yr.

Y 93–21

Manufacturer. Goldschmidt Chemical Corporation.

Chemical. (G) Aliphatic polyurethaneurea.

Use/Production. (G) Open, nondispersive use. Prod. range: Confidential.

Y 93–22

Manufacturer. Goldschmidt Chemical Corporation.

Chemical. (G) Aliphatic polyurethaneurea.

Use/Production. (G) Open, nondispersive use. Prod. range: Confidential.

Dated: December 3, 1992.

Frank V. Caesar,

Acting Director, Information Management Division, Office of Toxic Substances.

[FR Doc. 92–30439 Filed 12–14–92; 8:45 am]

BILLING CODE 6560–50–F

FEDERAL DEPOSIT INSURANCE CORPORATION

Information Collection Submitted to OMB for Review

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Notice of information collection submitted to OMB for review and approval under the Paperwork Reduction Act.

SUMMARY: The submission is summarized as follows:

Type of Review: Extension of expiration date without any change in substance or method of collection.

Title: Application to Participate in a Conversion Transaction.

Form Number: None (letter application).

OMB Number: 3064–0098.

Expiration Date of OMB Clearance: February 28, 1993.

Frequency of Response: On occasion.

Respondents: Any insured depository institution applying for approval from the FDIC to participate in a conversion transaction which involves the transfer of deposits between a member of the Savings Association Insurance Fund and a member of the Bank Insurance Fund or vice versa.

Number of Respondents: 35.

Number of Responses per Respondent: 1.

Total Annual Responses: 35.

Average Number of Hours per Response: 3.

Total Annual Burden Hours: 105.

OMB Reviewer: Gary Waxman, (202) 395–7340, Office of Management and Budget, Paperwork Reduction Project 3064–0098, Washington, DC 20503.

FDIC Contact: Steven F. Hanft, (202) 898–3907, Office of the Executive Secretary, room F–400, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

Comments: Comments on this collection of information are welcome and should be submitted on or before February 16, 1993.

ADDRESSES: A copy of the submission may be obtained by calling or writing the FDIC contact listed above. Comments regarding the submission should be addressed to both the OMB reviewer and the FDIC contact listed above.

SUPPLEMENTARY INFORMATION: The FDIC is requesting OMB approval to extend the use of the letter application, which is required for depository institutions that wish to obtain the FDIC's approval to participate in a conversion transaction. Such transactions generally involve the transfer of deposits between the Savings Association Insurance Fund and the Bank Insurance Fund or vice versa. The requirement is based on statutory requirements contained in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"). Under FIRREA (section 206(a)(7), Pub. L. 101–73), no insured depository institution may participate in a conversion transaction without the prior approval of the FDIC.

Dated: December 9, 1992.

Federal Deposit Insurance Corporation.

Hoyle L. Robinson,

Executive Secretary.

[FR Doc. 92–30347 Filed 12–14–92; 8:45 am]

BILLING CODE 6714–01–M

FEDERAL EMERGENCY MANAGEMENT AGENCY

[FEMA–969–DR]

Georgia; Amendment to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of

Georgia (FEMA–969–DR), dated December 1, 1992, and related determinations.

EFFECTIVE DATE: December 4, 1992.

FOR FURTHER INFORMATION CONTACT: Pauline C. Campbell, Disaster Assistance Programs, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–3606.

SUPPLEMENTARY INFORMATION: The notice of a major disaster for the State of Georgia, dated December 1, 1992, is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of December 1, 1992.

The counties of Dade and Talbot for Individual Assistance. The counties of Jones, Lincoln, Lumpkin, Monroe, Spaulding, Taliaferro, and Wilkes for Individual Assistance and Public Assistance.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance.)

Grant C. Peterson,

Associate Director, State and Local Programs and Support.

[FR Doc. 92–30385 Filed 12–14–92; 8:45 am]

BILLING CODE 6718–02–M

[FEMA–969–DR]

Georgia: Notice of Major Disaster and Related Determinations

AGENCY: Federal Emergency Management (FEMA).

ACTION: Notice.

EFFECTIVE DATE: December 1, 1992.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Georgia (FEMA–969–DR), dated December 1, 1992, and related determinations.

FOR FURTHER INFORMATION CONTACT: Pauline C. Campbell, Disaster Assistance Programs, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–3606.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated December 1, 1992, the President declared a major disaster under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq.*), as follows:

I have determined that the damage in certain areas of the State of Georgia, resulting from tornadoes, accompanied by high winds and heavy rain, on November 22, 1992, and continuing is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act ("the Stafford Act"). I, therefore, declare that such a major disaster exists in the State of Georgia.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes, such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide individual Assistance and Public Assistance in the designated areas. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance will be limited to 75 percent of the total eligible costs.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for a period not to exceed six months after the date of this declaration.

Notice is hereby given that pursuant to the authority vested in the Director of the Federal Emergency Management Agency under Executive Order 12148, I hereby appoint Mr. Edward Thomas of the Federal Emergency Management Agency to act as the Federal Coordinating Officer for this declared disaster.

I do hereby determine the following areas of the State of Georgia to have been affected adversely by this declared major disaster:

The counties of Carroll, Cherokee, Cobb, Greene, and Putnam for Individual Assistance and Public Assistance.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance.)

Wallace E. Stickney,

Director.

[FR Doc. 92–30386 Filed 12–14–92; 8:45 am]

BILLING CODE 6718–02–M

[FEMA–970–DR]

Texas; Notice of Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

EFFECTIVE DATE: December 4, 1992.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Texas (FEMA–970–DR), dated December 4, 1992, and related determinations.

FOR FURTHER INFORMATION CONTACT: Pauline C. Campbell, Disaster Assistance Programs, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–3606.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated December 4, 1992, the President declared a major disaster under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq.*), as follows:

I have determined that the damage in certain areas of the State of Texas, resulting from severe thunderstorms and tornadoes on November 21, 1992, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act ("the Stafford Act"). I, therefore, declare that such a major disaster exists in the State of Texas.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes, such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Individual Assistance in the designated areas. Public Assistance may be added at a later date if requested and warranted. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance will be limited to 75 percent of the total eligible costs.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for a period not to exceed six months after the date of this declaration.

Notice is hereby given that pursuant to the authority vested in the Director of the Federal Emergency Management Agency under Executive Order 12148, I hereby appoint Mr. Brad Harris of the Federal Emergency Management Agency to act as the Federal Coordinating Officer for this declared disaster.

I do hereby determine the following areas of the State of Texas to have been affected adversely by this declared major disaster:

Harris County for Individual Assistance.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance.)

Wallace E. Stickney,

Director.

[FR Doc. 92–30369 Filed 12–14–92; 8:45 am]

BILLING CODE 6718–02–M

FEDERAL MARITIME COMMISSION

Notice of Agreement(s) Filed; American President Lines, Ltd. et al.

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 800 North Capitol Street, NW., 9th Floor.

Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the Federal Register in which this notice appears. The requirements for comments are found in § 572.603 of title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No.: 202–010776–072.

Title: Asia North America Eastbound Rate Agreement.

Parties:

American President, Lines, Ltd.
Kawasaki Kisen Kaisha, Ltd.
A.P. Moller-Maersk Line
Mitsui O.S.K. Lines, Ltd.
Neptune Orient Lines, Ltd.
Nippon Yusen Kaisha Line
Orient Overseas Container Line
Sea-Land Service, Inc.

Synopsis: The proposed amendment would restrict voting privileges on tariff items related to all-water service to those carriers who maintain and advertise regular all-water service.

Agreement No.: 203–011223–007.

Title: Transpacific Stabilization Agreement.

Parties:

American President Lines, Ltd.
Evergreen Marine Corp. (Taiwan) Ltd.
Hanjin Shipping Co., Ltd.
Hyundai Merchant Marine Co., Ltd.
Kawasaki Kisen Kaisha, Ltd.
A.P. Moller-Maersk Line
Maersk K.K.
Mitsui O.S.K. Lines, Ltd.
Neptune Orient Lines, Ltd.
Nippon Yusen Kaisha
Orient Overseas Container Line, Inc.
Sea-Land Service, Inc.
Yangming Marine Transportation Corp.

Synopsis: This modification adds Hapag-Lloyd Aktiengesellschaft as a party to the Agreement and corrects the addresses of several existing parties to the Agreement. The parties have requested a shortened review period.

Dated: December 9, 1992.

By Order of the Federal Maritime Commission.

Joseph C. Polking,

Secretary.

[FR Doc. 92–30324 Filed 12–14–92; 8:45 am]

BILLING CODE 6730–01–M

FEDERAL RESERVE SYSTEM

Barclays PLC, et al.; Notice of Applications to Engage de novo in Permissible Nonbanking Activities

The companies listed in this notice have filed an application under § 225.23(a)(1) of the Board's Regulation Y (12 CFR 225.23(a)(1)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to commence or to engage *de novo*, either directly or through a subsidiary, in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 4, 1993.

A. Federal Reserve Bank of New York (William L. Rutledge, Vice President) 33 Liberty Street, New York, New York 10045:

1. Barclays PLC, London, England, and Barclays Bank PLC, London, England; to engage *de novo* through Barclays de Zoete Wedd Securities, Inc., New York, New York, in acting, for affiliated and nonaffiliated persons, as a futures commission merchant and advisor with respect to financial futures and options contracts, pursuant to §§ 225.25(b)(18) and (19) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, December 9, 1992.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 92–30358 Filed 12–14–92; 8:45 am]

BILLING CODE 6210–01–F

Citizens Financial Corporation Employee Stock Ownership Plan and Trust, et al.; Formations of; Acquisitions by; and Mergers of Bank Holding Companies

The companies listed in this notice have applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and § 225.14 of the Board's Regulation Y (12 CFR 225.14) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank or to the offices of the Board of Governors. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Unless otherwise noted, comments regarding each of these applications must be received not later than December 30, 1992.

A. Federal Reserve Bank of Chicago (David S. Epstein, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. Citizens Financial Corporation Employee Stock Ownership Plan and Trust, Fort Atkinson, Wisconsin; to acquire 40 percent of the voting shares of Citizens Financial Corporation, Fort Atkinson, Wisconsin, and thereby indirectly acquire Citizens State Bank, Fort Atkinson, Wisconsin.

B. Federal Reserve Bank of St. Louis (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63166:

1. Union Planters Corporation, Memphis, Tennessee; to acquire 100 percent of the voting shares of Farmers Union Bank, Ripley, Tennessee.

C. Federal Reserve Bank of Dallas (W. Arthur Tribble, Vice President) 400 South Akard Street, Dallas, Texas 75222:

1. Overton Financial Corporation, Overton, Texas, and its wholly-owned subsidiary, Overton Delaware Corporation, Dover, Delaware; together to acquire up to 15 percent of the voting shares of Longview Financial Corporation, Longview, Texas, and Longview Bank & Trust Company, Longview, Texas.

Board of Governors of the Federal Reserve System, December 9, 1992.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 92–30359 Filed 12–14–92; 8:45 am]

BILLING CODE 6210–01–F

National City Corporation; Acquisition of Company Engaged in Permissible Nonbanking Activities

The organization listed in this notice has applied under § 225.23(a)(2) or (f) of the Board's Regulation Y (12 CFR 225.23(a)(2) or (f)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to acquire or control voting securities or assets of a company engaged in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

The application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Comments regarding the application must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than December 29, 1992.

A. Federal Reserve Bank of Cleveland (John J. Wixted, Jr., Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101:

1. National City Corporation, Cleveland, Ohio; to acquire JBS Associates, Inc., Ringwood, New Jersey, and thereby engage in providing check collection and check guarantee services, which consist of check collection, check verification, and check guarantee to various corporate customers, pursuant to §§ 225.25(b)(22) and (23) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, December 9, 1992.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 92–30360 Filed 12–14–92; 8:45 am]

BILLING CODE 6210–01–F

Van Diest Investment Company, et al.; Formations of; Acquisitions by; and Mergers of Bank Holding Companies

The companies listed in this notice have applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and § 225.14 of the Board's Regulation Y (12 CFR 225.14) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank or to the offices of the Board of Governors. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Unless otherwise noted, comments regarding each of these applications must be received not later than January 7, 1993.

A. Federal Reserve Bank of Chicago (David S. Epstein, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. Van Diest Investment Company, Ankeny, Iowa; to merge with Hamilton County Bancshares, Inc., Webster City, Iowa, and thereby indirectly acquire First State Bank, Webster City, Iowa.

B. Federal Reserve Bank of Kansas City (John E. Yorke, Senior Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. CNB Financial Corp., Kansas City, Kansas; to acquire 100 percent of the voting shares of Security State Bank of Fort Scott, Fort Scott, Kansas.

2. Raton Capital Corporation, Raton, New Mexico; to become a bank holding company by acquiring 100 percent of the voting shares of International State Bank, Raton, New Mexico.

3. Wally Bancorp, Inc., Parker, Colorado; to become a bank holding company by acquiring 100 percent of the voting shares of Community Bank of Parker, Parker, Colorado.

C. Federal Reserve Bank of Dallas (W. Arthur Tribble, Vice President) 400 South Akard Street, Dallas, Texas 75222:

1. First Abilene Bankshares, Inc., Abilene, Texas; to acquire 100 percent of the voting shares of Stephenville Bank & Trust Co., Stephenville, Texas.

2. First Abilene Bankshares of Delaware, Inc., Wilmington, Delaware; to acquire 100 percent of the voting shares of Stephenville Bank & Trust Co., Stephenville, Texas.

Board of Governors of the Federal Reserve System, December 9, 1992.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 92–30361 Filed 12–14–92; 8:45 am]

BILLING CODE 6210–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Health Care Policy and Research

Development of Clinical Guideline For Smoking Prevention and Cessation with Centers for Disease Control

The Agency for Health Care Policy and Research and the Centers for Disease Control announce that they are: (1) Establishing a panel of health care experts and consumers to develop a clinical practice guideline for smoking prevention and cessation; and (2) inviting nominations of qualified individuals to serve as the chairperson(s) and as panel members.

Background

The Omnibus Budget Reconciliation Act of 1989 (Pub. L. 101–239) added a new title IX to the Public Health Service

Act (the Act), which established the Agency for Health Care Policy and Research (AHCPR) to enhance the quality, appropriateness, and effectiveness of health care services, and access to such services. (See 42 U.S.C. 299–299c–6 and 1320b–12.) The Agency for Health Care Policy and Research Reauthorization Act of 1992 (Pub. L. 102–410) enacted on October 13, 1992, amended certain provisions of the Act. In keeping with its legislative mandates, AHCPR is arranging for the development, periodic review, and updating of clinically relevant guidelines that may be used by physicians, other health care practitioners, educators, and consumers to assist in determining how diseases, disorders, and other health conditions can most effectively and appropriately be prevented, diagnosed, treated, and clinically managed.

Section 912 of the Act (42 U.S.C. 299b–1(b)), as amended by Public Law 102–410, requires that the guidelines:

1. Be based on the best available research and professional judgment;

2. Be presented in formats appropriate for use by physicians, other health care practitioners, medical educators, medical review organizations, and consumers;

3. Be presented in treatment-specific or condition-specific forms appropriate for use in clinical practice, educational programs, and reviewing quality and appropriateness of medical care;

4. Include information on risks and benefits of alternative strategies for prevention, diagnosis, treatment, and management of the particular health condition(s); and

5. Include information on the costs of alternative strategies for prevention, diagnosis, treatment, and management of the particular health condition(s), where cost information is available and reliable.

Section 913 of the Act (42 U.S.C. 299b–2) describes two mechanisms through which AHCPR may arrange for development of guidelines: 1. Panels of qualified health care experts and consumers may be convened; and 2. contracts may be awarded to public and private non-profit organizations. The AHCPR has elected to use the panel process for development of clinical practice guidelines for smoking prevention and cessation.

Section 914 of the Act (42 U.S.C. 299b–3(a)), as amended by Public Law 102–410, identifies factors to be considered in establishing priorities for guidelines, including the extent to which the guidelines would:

1. Improve methods for disease prevention;

2. Improve methods of diagnosis, treatment, and clinical management for the benefit of a significant number of individuals;

3. Reduce clinically significant variations among clinicians in the particular services and procedures utilized in making diagnoses and providing treatments; and

4. Reduce clinically significant variations in the outcomes of health care services and procedures.

Also, in accordance with title IX of the PHS Act and section 1142 of the Social Security Act, the Administrator is to assure that the needs and priorities of the Medicare program are reflected appropriately in the agenda and priorities for development of guidelines.

The Centers for Disease Control (CDC) serve as the national focus for developing and supporting disease prevention and control, environmental health, and health promotion and health education activities designed to improve the health of the people of the United States. Their responsibilities under 42 U.S.C. 241, 300u–300u–2, and 15 U.S.C. 1341 and 4401, include the study and prevention of chronic diseases and controllable risk factors such as cigarette smoking and smokeless tobacco use. The Office on Smoking and Health (OSH), a division of the National Center for Chronic Disease Prevention and Health Promotion, administers a program to inform Americans about the dangers of tobacco use in order to reduce death and disability due to smoking and smokeless tobacco use. In order to reduce the morbidity and mortality from tobacco use, OSH promotes and stimulates research on the determinants and health effects of smoking and smokeless tobacco use.

Panel Nominations

The panel that will develop the guideline for smoking prevention and cessation will consist of two co-chairpersons and nine to fifteen members. To assist in identifying members for the panel, AHCPR and CDC are requesting recommendations from a broad range of interested individuals and organizations, including physicians representing primary care and relevant specialties, physicians' assistants, nurses, nurse practitioners, dentists, pharmacists, respiratory care therapists and allied health and other health care practitioners, health care institutions, and consumers with pertinent experience or information. In making panel selections, AHCPR and CDC will maintain a balance between individuals selected from academic settings and individuals selected without full-time academic appointments. Also, at least two other members of this panel shall be individuals who do not derive their primary source of revenue directly from the performance of procedures discussed in this guideline.

AHCPR and CDC are especially interested in receiving nominations of: (1) Persons with experience in developing clinical guidelines; (2) persons with relevant experience in basic and clinical research in: Disease prevention and health promotion, particularly as they relate to smoking prevention and cessation; addictive behaviors; behavioral medicine; pulmonary medicine; social psychology of health behaviors, social marketing, cardiovascular medicine or other related areas; (3) persons with relevant experience and clinical and technical skills needed to produce smoking-related behavior changes in various types of smokers (including pre-symptomatic as well symptomatic individuals); (4) persons with relevant experience and clinical and technical skills needed to prevent people in different target populations from beginning smoking; (5) epidemiologists who are familiar with smoking-related diseases or their treatments; (6) health services researchers or health economists who have expertise regarding smoking-related diseases as well as smoking cessation interventions and other treatments; and (7) consumers who have had personal experience with smoking prevention or cessation, either as a former smoker, a family member or friend of a former smoker, or as a person who actively works with smoking prevention or cessation programs.

This notice requests nominations of qualified individuals to serve on the panel as members or as panel chairpersons. The functions of the panel chairpersons are critical to the process of developing guidelines. Chairpersons provide leadership regarding methodology, literature review, panel deliberations, and formation of the final products. Nominations for chairpersons should take into consideration the criteria specified below, which AHCPR and CDC will use in making panel selections.

- Relevant training and clinical experience;
- Demonstrated interest in quality assurance and research on the clinical condition(s) under consideration and the related treatment of the condition(s), including publication of relevant peer-reviewed articles;
- Commitment to the need to produce clinical guidelines;
- Recognition in the field with a record of leadership in relevant activities;

- Broad public health view of the utility of particular procedures(s) or clinical services(s);
- Demonstrated capacity to lead a health care team in group decision making processes;
- Demonstrated capacity to respond to consumer concerns;
- Prior experience in developing guidelines for the clinical condition in question; and
- No conflict of interest that would impair the scientific integrity of the guidelines.

When the panel chairperson(s) has been appointed, nominations for members of the panel will be submitted to the chairperson(s) for review and consideration. The chairperson(s) will, in turn, recommend proposed panel members to AHCPR and CDC. Appointments of the panel members will be made by the Administrator, AHCPR, in consultation with CDC, after review of proposed members' qualifications and the overall composition of the panel to ensure representation of a range of expertise and experience.

Nominations should indicate whether the individual is being recommended to serve as the panel chairperson(s) or to serve as a panel member. The term of appointment for panel chairpersons is three years and the subsequent panel chairpersons will be selected from the existing panel members at that time. Each nomination must include a copy of the individual's curriculum vitae or resume, plus a statement of the rationale for the specific nomination. To be considered, nominations must be received by January 22, 1993, at the following address: Office of the Forum for Quality and Effectiveness in Health Care, Kathleen McCormick, PhD, RN, Director, 2101 E. Jefferson Street, Suite 401 West, Rockville, MD 20852, Phone: (301) 227–6671, Fax: (301) 227–8332.

For Additional Information

Additional information on the guideline development process is contained in the AHCPR Fact Sheet, "AHCPR-Commissioned Clinical Practice Guidelines," dated January 1992 and the Program Note, "Clinical Guideline Development," dated August 1990. These documents can be obtained from the AHCPR Publications Clearinghouse, P.O. Box 8547, Silver Spring, MD 20907; or call Toll-Free: 1–800–358–9295.

Also, information can be obtained by contacting Kathleen A. McCormick, Ph.D., R.N., Director, Office of the Forum for Quality and Effectiveness in Health Care, Agency for Health Care Policy and Research, at the Rockville address above.

Dated: December 7, 1992.

J. Jarrett Clinton,

Administrator.

[FR Doc. 92–30237 Filed 12–14–92; 8:45 am]

BILLING CODE 4160–90–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–920–03–4120–03]

Notice of Competitive Coal Lease Sale; West Rocky Butte Tract, WYW122586

AGENCY: Bureau of Land Management, Interior, Wyoming.

SUMMARY: Notice is hereby given that certain coal resources in the West Rocky Butte Tract described below in Campbell County, Wyoming, will be offered for competitive lease by sealed bid in accordance with the provisions of the Mineral Leasing Act of 1920, as amended (30 U.S.C. 181 et seq.).

DATES: The lease sale will be held at 2 p.m., on Thursday, January 7, 1993. Sealed bids must be submitted on or before 4 p.m., on Wednesday, January 6, 1993.

ADDRESSES: The lease sale will be held in the third floor conference room of the Wyoming State Office, 2515 Warren Avenue, Cheyenne, Wyoming 82001. Sealed bids must be submitted to the Cashier, Wyoming State Office, at the address given above, or to the Wyoming State Office, P.O. Box 1828, Cheyenne, Wyoming 82003–1828.

FOR FURTHER INFORMATION CONTACT: Laura Steele, Land Law Examiner or Eugene Jonart, Coal Coordinator at (307) 775–6250.

SUPPLEMENTARY INFORMATION: This coal lease sale is being held in response to an application for a coal lease sale from Northwestern Resources Co., of Butte, Montana. The coal resources to be offered consist of all reserves recoverable by surface mining methods in the following described lands located in Campbell County, Wyoming, approximately 10 miles southeast of the city of Gillette, Wyoming:

T. 48 N., R. 71 W., 6th P.M., Wyoming
Sec. 5: Lots 7 thru 9, 16 and 17;
Sec. 6: Lots 8, 14 (E2), 15, 16 and 23 (E2);
Sec. 7: Lot 5 (E2);
Sec. 8: Lot 4;
T. 49 N., R. 71 W., 6th P.M., Wyoming
Sec. 32: Lot 15.

Containing 463.205 acres.

The West Rocky Butte tract, located adjacent to the existing Rocky Butte Tract Federal coal lease, WYW78633, held by Northwestern Resources Co., contains Fort Union Formation coal of the Wyodak-Anderson zone. Up to three mineable coal seams (referred to as the Upper, Middle, and Lower coals) occur in this coal zone in this area. The Upper coal is the main seam, averaging approximately 67.5 feet thick over the entire West Rocky Butte Tract. The Middle coal of the Fort Union Formation is absent from the West Rocky Butte Tract; however, the Lower coal of the Fort Union Formation, present over a small area in the northeast portion of the West Rocky Butte Tract, averages about 21 feet thick. The Upper coal in the tract is estimated to consist of 55.5 million tons of in-place coal reserves and an estimated 1.2 million tons of in-place reserves in the lower coal. The tract area has an average overall stripping ratio of approximately 3.75 BCY (Bank Cubic Yards) overburden/ton of in-place coal. The Upper and Lower coals combined contain an estimated 55.0 million tons of recoverable coal (57.5 million tons of in-place coal). The coal rank is subbituminous C. Average in-place quality for the Upper coal is 8,354 BTU/LB., 4.30% ash, 0.27% sulfur, and 31.0% moisture. Average in-place quality for the Lower coal is 7,871 BTU/LB., 7.20% ash. 0.40% sulfur, and 31.0% moisture. This places the coal reserves in the West Rocky Butte Tract at the lower end of the quality range for coal being mined in the southern Powder River Basin.

The tract in this lease offering consists of split estate lands where the surface is owned by private surface owners. Consents granted by the surface owners have been filed with and verified by the Bureau of Land Management. The consents, consisting of agreements dated December 14, 1976, July 1, 1980, and October 2, 1992, which contain the purchase price, are a part of the detailed statement for the sale.

Bids for the tract will be in the form of sealed bids. Sealed bids should be sent by "Certified Mail, Return Receipt Requested", or be hand delivered to the Cashier, Wyoming State Office, 2515 Warren Avenue, P.O. Box 1828, Cheyenne, Wyoming 82003–1828. Bids received after 4 p.m., on Wednesday, January 6, 1993, will not be considered and will be returned to the sender.

If the applicant for the lease by application is not the successful bidder, the BLM may evaluate the existing National Environmental Policy Act documentation for the tract to determine if further analysis may be necessary, which could lead to a delay in lease issuance.

Any lease issued as a result of this offering will provide for payment of an annual advance rental of $3.00 per acre or fraction thereof per year and of a royalty payable to the United States of 12½ percent of the value of coal produced by strip or augur mining methods and 8 percent of the value of the coal produced by underground mining methods. The value of the coal will be determined in accordance with 30 CFR 203.250.

Bidding instructions for the tract offered and the terms and conditions of the proposed coal lease are contained in the Detailed Statement available from the Wyoming State Office Public Information Desk at the addresses above. Case file documents, WYW122586, are also available for inspection at the Wyoming State Office.

Dale L. Wadleigh,

Acting Chief, Branch of Mining Law & Solid Minerals.

[FR Doc. 92-30423 Filed 12-14-92; 8:45 am]

BILLING CODE 4310-22-M

[UT-050-03-4410-03]

Proposed Amendment to the Henry Mountain Resource Area Management Framework Plan

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of proposed amendment.

SUMMARY: The Henry Mountain Resource Area (HMRA) is proposing to amend the HMRA Management Framework Plan (MFP) to allow for the change in allocation of forage between wildlife and livestock within the HMRA. The Utah Division of Wildlife Resources has evaluated the need for additional buffalo (Bison bison) in the HMRA and has assisted the Bureau of Land Management (BLM) in preparing an Environmental Assessment (EA) addressing the forage allocations in the Pennell, Steel Butte, and Nasty Flat allotments. This area is within the area which has been nominated for the Buffalo Habitat Area of Critical Environmental Concern. The following Wilderness Study Areas (WSA) are involved: Mount Ellen-Blue Hills WSA, Bull Mountain WSA, and Mount Pennell WSA. Changes would be within the guidelines of the Interim Management Policy and would not impair or prevent areas from being eligible for wilderness designation.

This proposal would increase the allocation of forage to buffalo and reduce the allocation of forage to livestock on the Pennell, Steel Butte, and Nasty Flat allotments.

This amendment would also provide for the adjustment in forage allocations between allotments throughout the HMRA between livestock and wildlife as determined to be needed by monitoring and analysis.

FOR FURTHER INFORMATION CONTACT: Alan Partridge, Bureau of Land Management, Richfield District Office, 900 North 150 East, Richfield, Utah 84701.

SUPPLEMENTARY INFORMATION: An EA will be prepared by the Richfield District of the BLM to address any impacts of the proposed amendments. Public participation is requested to identify issues or concerns on the proposed amendment. The comment period for this notice will commence with the date of publication of this notice. Protests must be submitted on or before January 15, 1993.

G. William Lamb,

Acting State Director.

[FR Doc. 92-30341 Filed 12-14-92; 8:45 am]

BILLING CODE 4310-DQ-M

[NV-930-93-4210-04; N-48090]

Issuance of Land Exchange Conveyance Document and Order Providing for Opening of Land, Nevada

AGENCY: Bureau of Land Management, Interior.

SUMMARY: This notice identifies Federal and non-Federal land involved in a recently completed exchange transaction. The mineral estates in the Federal and non-Federal land were conveyed simultaneously with the surface estate.

EFFECTIVE DATE: January 14, 1993.

FOR FURTHER INFORMATION CONTACT: Mary Clark, Nevada State Office, Bureau of Land Management, P.O. Box 12000, Reno, NV 89520, (702) 785-6530.

SUPPLEMENTARY INFORMATION: On November 10, 1992, the United States issued Patent No. 27-93-0002 to Van Norman Ranches, Inc., a Nevada corporation, for the following described land pursuant to section 206 of the Act of October 21, 1976 (43 U.S.C. 1716):

Mount Diablo Meridian, Nevada

T. 40 N., R. 52 E.,
Sec. 25, lots 1, 2, and 3.

The area described contains 118.36 acres in Elko County, Nevada.

In exchange for that land, the United States acquired the following described land from the above-named party:

Mount Diablo Meridian, Nevada

T. 38 N., R. 53 E.,
Sec. 5, SW¼SE¼;
Sec. 8, NE¼NW¼;
Sec. 16, NW¼SE¼;
Sec. 17, SW¼SE¼.

The area described contains 160 acres in Elko County, Nevada.

Title to the non-Federal land was accepted on November 10, 1992. The value of the Federal land exceeded the value of the non-Federal land by $100.00. An equalization payment in that amount was made to the United States by Van Norman Ranches, Inc. The purpose of the exchange was for the United States to acquire non-Federal land with high values for crucial mule deer summer habitat, habitat for sagegrouse, nongame birds and mammals, and nesting habitat for raptors and cavity nesting birds.

At 10 a.m. on January 14, 1993, the lands acquired by the United States will be open to the operation of the public land laws generally, subject to valid existing rights, the provisions of existing withdrawals, other segregations of record and the requirements of applicable law. All valid applications received at or prior to 10 a.m. on January 14, 1993, will be considered as simultaneously filed at that time.

Those received thereafter shall be considered in the order of filing. At 10 a.m. on January 14, 1993, the land acquired by the United States will be open to location under the mining laws. Appropriation of the land under the general mining laws prior to the date and time of restoration is unauthorized. Any such attempted appropriation, including attempted adverse possession under 30 U.S.C. 38, shall vest no rights against the United States. Acts required to establish a location and to initiate a right of possession are governed by State law where not in conflict with Federal law. The Bureau of Land Management will not intervene in disputes between rival locators over possessory rights since Congress has provided for such determinations in local courts.

At 10 a.m. on January 14, 1993, the land acquired by the United States will also be open to applications/offers under the mineral leasing laws, the material sale laws, and the Geothermal Steam Act.

Robert G. Steele,

Acting State Director, Nevada.

[FR Doc. 92-30318 Filed 12-14-92; 8:45 am]

BILLING CODE 4310-HC-M

[ES-020-03-4410-02]

Availability of Proposed Planning Criteria for the Florida Resource Management Plan

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: Pursuant to 43 CFR 1610.4-2, notice is hereby given of the availability of proposed planning criteria for the Florida Resource Management Plan (RMP).

DATES: Comments on the proposed planning criteria will be accepted through January 15, 1993.

ADDRESSES: Send comments to Bureau of Land Management, Jackson District, 411 Briarwood Drive, suite 404, Jackson, Mississippi 39206.

FOR FURTHER INFORMATION CONTACT: Duane Winters, RMP Team Leader, Jackson District, (601) 977-5400.

SUPPLEMENTARY INFORMATION: The RMP will guide future use of several hundred acres, comprised of small parcels of public land located in counties throughout the State. The RMP will also guide the Bureau's mineral leasing and permitting responsibilities on approximately 270,000 acres of split estate land where federal ownership is limited to mineral interests.

The BLM also has certain mineral leasing and permitting responsibilities on other areas of federal ownership including military reservations and National Forests. These responsibilities will be carried out in accordance federal laws and regulations as well as applicable land use plans of other federal agencies. The RMP will include an Environmental Impact Statement (EIS) which will address the impacts of foreseeable mineral development of these lands.

Copies of the proposed planning criteria and records of all phases of the planning process will be available for public review at the Jackson District Office. Draft and final documents of the RMP/EIS will be available upon request.

Dated: December 3, 1992.

Sammy St. Clair,

Acting District Manager.

[FR Doc. 92-30340 Filed 12-14-92; 8:45 am]

BILLING CODE 4310-GJ-M

National Park Service

National Register of Historic Places; Notification of Pending Nominations

Nominations for the following properties being considered for listing in the National Register were received by the National Park Service before December 5, 1992. Pursuant to § 60.13 of 36 CFR part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded to the National Register, National Park Service, P.O. Box 37127, Washington, DC 20013-7127. Written comments should be submitted by December 30, 1992.

Carol D. Shull,

Chief of Registration, National Register.

Florida

Highlands County

Old Lake Placid A. C. L. Railroad Depot, 19 Park Ave. W., Lake Placid, 92001733.

Georgia

Burke County

Hopeful Baptist Church, Winter Rd. E of jct. with Blythe Rd., Keysville vicinity, 92001734.

Louisiana

Ascension Parish

Warren, Robert Penn, House, 16381 Old Jefferson Hwy., Prairieville, 92001732.

Nebraska

Richardson County

Rulo Bridge (Highway Bridges in Nebraska MPS), US 159 over the Missouri R., Rulo, 92000718

New Jersey

Atlantic County

Beth Israel Synagogue, 14 S. Pennsylvania Ave., Atlantic City, 92001737.

North Carolina

Watauga County

Farthing, Ben, Farm, NC 1121 (Rominger Rd.) W side, just N of Watauga R., Sugar Grove vicinity, 92001736.

Tennessee

Rutherford County

Middle Tennessee State Teachers College Training School, 923 E. Lytle St., Murfreesboro, 92001731.

Texas

Bexar County

XC-99, Convair Military Cargo-Transport Aircraft, 3119 Growdon Rd., San Antonio, 92001735.

[FR Doc. 92-30348 Filed 12-14-92; 8:45 am]

BILLING CODE 4310-70-M

INTERSTATE COMMERCE COMMISSION

Notice of Trackage Rights Exemption; Dallas, Garland & Northeastern Railroad, Inc., et al.

[Finance Docket No. 32198]

The Atchison, Topeka & Santa Fe Railway Company (ATSF) has agreed to grant overhead trackage rights to Dallas, Garland & Northeastern Railroad, Inc. (DGNO) between milepost 66.7 at Garland, TX, and milepost 51.7 at Dallas, TX, a distance of approximately 15 miles. DGNO will also acquire the right to use certain sidings for the purpose of meeting and passing trains and the right to use certain existing connections. The involved trackage rights are presently held by Missouri Pacific Railroad Company (MP).[1] DGNO will obtain the trackage rights through an unconditional assignment of an agreement between ATSF and MP, dated April 22, 1992. ATSF has agreed to the assignment of trackage rights from MP to DGNO. The trackage rights were to become effective on or after December 2, 1992.

This notice is filed under 49 CFR 1180.2(d)(7). Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not stay the transaction. Pleadings must be filed with the Commission and served on: Kelvin J. Dowd, Slover & Loftus, 1224 Seventeenth Street, NW., Washington. DC 20036.

As a condition to the use of this exemption, any employees, including employees of MP, adversely affected by the trackage rights will be protected under Norfolk and Western Ry. Co—Trackage Rights—BN, 354 I.C.C. 605 (1978), as modified in Mendocino Coast Ry., Inc.—Lease and Operate, 360 I.C.C. 653 (1980).

Decided: December 7, 1992.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 92-30365 Filed 12-14-92; 8:45 am]

BILLING CODE 7035-01-M

[1] MP obtained the trackage rights as an incidental part of a joint relocation project exempted from Commission approval in Finance Docket No. 32060, Missouri Pacific Railroad Company and The Atchison, Topeka and Santa Fe Railway Company—Joint Relocation Project Exemption (not printed), served April 27, 1992.

[Finance Docket No. 32199]

Los Angeles County Transportation Commission; Acquisition Exemption; Southern Pacific Transportation Co.

AGENCY: Interstate Commerce Commission.

ACTION: Notice of exemption.

SUMMARY: The Commission, under 49 U.S.C. 10505, exempts from the requirements of 49 U.S.C. 11343, *et seq.*, the purchase by Los Angeles County Transportation Commission of a 75.9-mile line in the Los Angeles area (described in the footnote below [2]) owned by Southern Pacific Transportation Company (SP). The exemption is granted subject to appropriate labor protection.

DATES: The exemption will be effective on December 15, 1992. Petitions for reopening must be filed by January 4, 1993.

ADDRESSES: Send pleadings referring to Finance Docket No. 32199 to:

(1) Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.
(2) Charles A. Spitulnik, Hopkins & Sutter, suite 700, 888 16th Street, NW., Washington, DC 20006.

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar, (202) 927–5660, [TDD for hearing impaired: (202) 927–5721].

SUPPLEMENTARY INFORMATION: Additional information is contained in the Commission's decision. To purchase a copy of the full decision, write, call or pick up in person from: Dynamic Concepts, Inc., room 2229, Interstate Commerce Commission Building, Washington, DC 20423. Telephone (202) 289–4359. [Assistance for the hearing impaired is available through TDD services (202) 927–5721.]

Decided: December 8, 1992.

By the Commission, Chairman Philbin, Vice Chairman McDonald, Commissioners Simmons and Phillips.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 92–30366 Filed 12–14–92; 8:45 am]

BILLING CODE 7035–01–M

[2] The line, known as the "Saugus Main Line," consists of:

a. A 40-foot strip on the west side of the right-of-way from Lancaster (milepost B–405.50) to south of Palmdale (milepost B–414.72);

b. All of SP's right-of-way from south of Palmdale (milepost B–414.72) to north of Saugus (milepost B–448.55);

c. All of SP's remaining right-of-way from north of Saugus (milepost B–448.55) to north of Taylor Yard (milepost B–478.21);

d. A 50-foot right-of-way, through Taylor Yard on SP's new alignment from north of Taylor Yard (milepost B–478.21) to Bridge Five (milepost B–481.10); and

e. Sale of SP's interest in the bridge from East Bank Junction (milepost B–481.9) to Mission Tower (milepost B–482.2) across LAUPT Bridge over the Los Angeles River.

DEPARTMENT OF JUSTICE

Lodging of Consent Decree Pursuant to the Federal Water Pollution Control Act in United States v. Sepco Industries, Inc.

In accordance with Department of Justice regulation, 28 CFR 50.7, 38 FR 19029, notice is hereby given that a proposed Consent Decree in United States versus Sepco Industries, Inc., Civil Action No. 86–0670, was lodged in the United States District Court for the Eastern District of New York on November 24, 1992. The proposed Consent Decree, if entered, will resolve the liability of Sepco Industries, Inc., under sections 307, 308, and 309 of the Federal Water Pollution Control Act ("Act"), 33 U.S.C. 1317, 1318, 1319, for alleged violations of the pretreatment requirements of the Act at Sepco Industries' electroplating facility in Brooklyn, New York. The settlement reflected in the proposed Consent Decree would require the Defendant to pay a civil penalty of $25,000 and to conduct specified tests in order to ensure compliance with the Act's pretreatment requirements in the future.

The Department of Justice will receive, for a period of thirty (30) days from the date of publication of this notice, written comments relating to the proposed Consent Decree. Comments should be addressed to the Acting Assistant Attorney General of the Environment and Natural Resources Division, United States Department of Justice, Washington, DC 20530, and should refer to United States versus Sepco Industries, Inc., Department of Justice No. 90–5–1–1–2546.

The proposed Consent Decree may be examined at the office of the United States Attorney for the Eastern District of New York, One Pierrepont Plaza, 11th Floor, Brooklyn, New York 11201; at the Region II office of the United States Environmental Protection Agency, Jacob Javits Federal Building, 26 Federal Plaza, New York, New York 20005; and at the Environmental Enforcement Section Document Center, 601 Pennsylvania Avenue, NW., Washington, DC 20004, 202–347–2072. A copy of the proposed consent decree may be obtained in person or by mail from the Document Center, Box 1097 at the above address. In requesting a copy, please enclose a check in the amount of $5.00 (25 cents per page reproduction costs) payable to Consent Decree Library.

Roger Clegg,

Acting Assistant Attorney General, Environment & Natural Resources Division.

[FR Doc. 92–30242 Filed 12–14–92; 8:45 am]

BILLING CODE 4410–01–M

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–27,984]

Homco International, Incorporated, Williston, ND; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, an investigation was initiated on November 9, 1992 in response to a worker petition which was filed on October 26, 1992 on behalf of workers at Homco International, Incorporated, operating out of Williston, North Dakota.

On November 18, 1992, the Department of Labor amended the determination of investigation TA–W–27,571 assigned to Homco International, Incorporated, Wilburton, Oklahoma. The amended determination, a certification, was issued to include various other operating locations in the state of North Dakota (TA–W–27,571B). This amended determination covers the workers at the site of the subject investigation. Therefore, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed at Washington, DC, this 4th day of December 1992.

Marvin M. Fooks,

Director, Office of Trade Adjustment Assistance.

[FR Doc. 92–30368 Filed 12–14–92; 8:45 am]

BILLING CODE 4510–30–M

Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for adjustment assistance issued during the period of November 1992.

In order for an affirmative determination to be made and a certification of eligibility to apply for adjustment assistance to be issued, each

of the group eligibility requirements of section 222 of the Act must be met.

(1) That a significant number or proportion of the workers in the workers' firm, or an appropriate subdivision thereof, have become totally or partially separated,

(2) That sales or production, or both, of the firm or subdivision have decreased absolutely, and

(3) That increases of imports of articles like or directly competitive with articles produced by the firm or appropriate subdivision have contributed importantly to the separations, or threat thereof, and to the absolute decline in sales or production.

Negative Determinations

In each of the following cases the investigation revealed that criterion (3) has not been met. A survey of customers indicated that increased imports did not contribute importantly to worker separations at the firm.

TA–W–27,816; Lally Manufacturing Corp., New York, NY

TA–W–27,817; Lally Manufacturing Corp., Port Leyden, NY

TA–W–27,818; Lally Manufacturing Corp., Adams NY

TA–W–27,822; Power Conversion, Inc., Elmwood Park, CA

TA–W–27,621; Central Plastic Co., Shawnee, OK

TA–W–27,686; Corrugated Paper Corp., Westborough, MA

TA–W–27,705; Unocal Corp., Energy Resources Div., North American Div., Louisiana Region, Lafayette, LA

TA–W–27,839; Omak Wood Products, Inc., Omak, WA

TA–W–27,808; Specialty Steel Products, Pittsburgh, PA

In the following cases, the investigation revealed that the criteria for eligibility has not been met for the reasons specified.

TA–W–27,868; Spooner Energy, Inc., Jackson, MS

The workers' firm does not produce an article as required for certification under section 222 of the Trade Act of 1974.

TA–W–27,909; Haverhill Shoe Co., Haverhill, MA

Increased imports did not contribute importantly to worker separations at the firm.

TA–W–27,926; Staballoy, Inc., Broussard, LA

The workers' firm does not produce an article as required for certification under section 222 of the Trade Act of 1974.

TA–W–27,617 & TA–W–27,775; Fujitsu Imaging Systems, Danbury, CT and Waltham, MA

The workers' firm does not produce an article as required for certification under section 222 of the Trade Act of 1974.

TA–W–27,698; The Timken Co., Canton, OH

U.S. imports of tapered roller bearings declined absolutely and relative to domestic shipments in 1991 compared to 1990 and remained essentially the same absolutely in the twelve month period ending in July 1992 compared to the same period ending in July 1991.

TA–W–27,913; Intrasearch, Inc., Englewood, CO

The workers' firm does not produce an article as required for certification under section 222 of the Trade Act of 1974.

TA–W–27,801; Spaulding Composites Co., Inc., Tonawanda, NY

The investigation revealed that criterion (2) and criterion (3) have not been met. Sales or production did not decline during the relevant period as required for certification. Increases of imports of articles like or directly competitive with articles produced by the firm or appropriate subdivision have not contributed importantly to the separations, or threat thereof, and to the absolute decline in sales or production.

Affirmative Determinations

TA–W–27,820, TA–W–27,830, TA–W–27,831; Mitchell Energy Corp., Decator, Alba and Bridgeport, TX

A certification was issued covering all workers separated on or after September 8, 1991.

TA–W–27,908; Center Fashions, Inc., DuPont, PA

A certification was issued covering all workers separated on or after September 9, 1991.

TA–W–27,874; Lor-Rog Industries, Inc., Joplin, MO

A certification was issued covering all workers separated on or after September 16, 1991.

TA–W–27,810; Hercules, Inc., Radford, VA

A certification was issued covering all workers separated on or after August 27, 1991.

TA–W–27,853 & TA–W–27,853A; Chevron Oil Field Research, LaHabra, CA & in The State of Texas

A certification was issued covering all workers separated on or after September 14, 1991.

TA–W–27,804; Anadrill (A Div of Schlumberger Technology Corp), Headquartered in Sugarland, TX and Operating at the Following Various Locations: A, Anchorage, AK; B, Bakersfield, CA; C, Houma, LA; D, Lafayette, LA; E, New Orleans, LA; F, Hobbs, NM; G, Williston, ND; H, Oklahoma City, OK; I, Alice, TX; J, Kilgore, TX; K, Houston, TX; L, Odessa, TX; M, Casper, WY

A certification was issued covering all workers separated on or after August 28, 1991.

I hereby certify that the aforementioned determinations were issued during the month of November 1992. Copies of these determinations are available for inspection in room C–4318, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210 during normal business hours or will be mailed to persons to write to the above address.

Dated: December 8, 1992.

Marvin M. Fooks,

Director, Office of Trade Adjustment Assistance.

[FR Doc. 92–30367 Filed 12–14–92; 8:45 am]

BILLING CODE 4510–30–M

Job Training Partnership Act; Indian and Native American Grantees

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice of availability of funds and of Solicitation for Grant Applications (SGA).

SUMMARY: The Employment and Training Administration, U.S. Department of Labor, announces the intent to award a grant on a competitive basis to develop an effective approach to communicating directly with Indian and Native American grantees on a timely and meaningful basis; and, to research and identify the best employment practices found among these grantees. The Indian and Native American Program is funded under the Job Training Partnership Act (JTPA), title IV, part A, section 401. The purpose of the Program is to provide comprehensive employment and training services for the Indian and Native American population;

Only Indian and Native American-owned or controlled organizations are eligible for this award. Indian or Native American-owned or controlled organizations are those where ownership or members of the governing body is at least 51% Indian or Native American.

DATES: The applications will be available December 30, 1992. The requests must be made in writing to the address below. Requests via telephone and/or telefacsimile (FAX) will not be honored. The request must cite SGA/DAA 92–014 and must include two (2) self-addressed labels. Requests will be

honored on a first come, first served basis until the supply of 300 solicitation packages is exhausted. The closing date for receipt of proposals will be February 16, 1993, 2 p.m. Eastern time. Any application not received at the designated place, date, and time of delivery specified will not be considered.

ADDRESSES: Mail your request to obtain a copy of the Solicitation's for Grant Application (SGA) to: U.S. Department of Labor, Employment and Training Administration, Office of Grants and Contract Management, Division of Acquisition and Assistance, 200 Constitution Avenue, NW., room C–4305, Washington, DC 20210, Attention: Brenda Banks, Reference SGA/DAA 92–014. In order to receive a copy of the application package, your request must include a certification that your organization is an "Indian" or "Native-American owned or controlled." Requests which fail to submit a Certification Statement will not be honored.

FOR FURTHER INFORMATION CONTACT: Brenda Banks, Telephone: (202) 219–8702 (This is not a toll free number).

SUPPLEMENTARY INFORMATION: The Employment and Training Administration, U.S. Department of Labor, will award one (1) grant at approximately $150,000. The period of performance will one (1) year from date of execution by the Government.

Signed at Washington, DC, on December 7, 1992.

Robert D. Parker,

ETA Grant Officer.

[FR Doc. 92–30323 Filed 12–14–92; 8:45 am]

BILLING CODE 4510–30–M

Mine Safety and Health Administration

Petitions for Modification

The following parties have filed petitions to modify the application of mandatory safety standards under section 101(c) of the Federal Mine Safety and Health Act of 1977.

1. Costain Coal, Inc.

[Docket No. M–92–158–C]

Costain Coal, Inc., P.O. Box 289, Sturgis, Kentucky 42459 has filed a petition to modify the application of 30 CFR 75.380(f)(2) (escapeways: bituminous and lignite mines) to its Wheatcroft Mine (I.D. No. 15–13920) and its Baker Mine (I.D. No. 15–14492) both located in Webster County, Kentucky. The petitioner proposes to maintain a fire extinguisher on board the golf cart as an alternate to using the automatic fire suppression system, and would not permit the golf cart to be left unattended in the primary escapeway. The petitioner asserts that the proposed alternate method would provide at least the same measure of protection as would the mandatory standard.

2. Shadow Coal Co.

[Docket No. M–92–159–C]

Shadow Coal Company, HC66, Box 494, Artemus, Kentucky 40903 has filed a petition to modify the application of 30 CFR 75.313 (methane monitors) to its No. 1 Mine (I.D. No. 15–16052) located in Knox County, Kentucky. The petitioner proposes to use a hand-held continuous-duty methane and oxygen monitor on permissible three-wheel tractors with drag bottom buckets.

3. Costain Coal, Inc.

[Docket No. M–92–160–C]

Costain Coal, Inc., P.O. Box 289, Sturgis, Kentucky 42459 has filed a petition to modify the application of 30 CFR 75.507 (power connection points) to its No. 11 High Wall Mine (I.D. No. 15–13920) located in Webster County, Kentucky. The petitioner proposes to use a nonpermissible submersible pump in a borehole in a sealed area of the 11 high wall Second Main East approximately 11 crosscuts from the William Station elevator landing. The petitioner asserts that the proposed alternate method would provide at least the same measure of protection as would the mandatory standard.

4. Drummond Company, Inc.

[Docket No. M–92–161–C]

Drummond Company, Inc., P.O. Box 10246, Birmingham, Alabama 35203 has filed a petition to modify the application of 30 CFR 75.1002 (location of trolley wires, trolley feeder wires, high-voltage cables and transformers) to its Shoal Creek Mine (I.D. No. 01–02901) located in Jefferson County, Alabama. The petitioner proposes to use high-voltage cables to power longwall equipment. The petitioner asserts that the proposed alternate method would provide at least the same measure of protection as would the mandatory standard.

5. Consolidation Coal Co.

[Docket No. M–92–162–C]

Consolidation Coal Company, 1800 Washington Road, Pittsburgh, Pennsylvania 15241 has filed a petition to modify the application of 30 CFR 75.304 (weekly examinations for hazardous conditions) to its Arkwright No. 1 Mine (I.D. No. 46–01452) located in Monongalia County, West Virginia. Due to deteriorating roof conditions, certain areas of the mine cannot be safely traveled. The petitioner proposes to establish evaluation points to monitor the quantity and quality of air entering and leaving the affected area. The petitioner asserts that the proposed alternate method would provide at least the same measure of protection as would the mandatory standard.

6. Costain Coal, Inc.

[Docket No. M–92–163–C]

Costain Coal, Inc., P.O. Box 289, Sturgis, Kentucky 42459 has filed a petition to modify the application of 30 CFR 75.360 (preshift examinations) to its Pyro No. 9 Wheatcroft Mine (I.D. No. 15–13920) located in Webster County, Kentucky. Due to hazardous conditions, the petitioner proposes to establish a continuous monitoring station to monitor the air passing through the Main North Parallel beginning at the Wheatcroft intake air shaft and ending at the First Submain East. The petitioner asserts that the proposed alternate method would provide at least the same measure of protection as would the mandatory standard.

7. Costain Coal, Inc.

[Docket No. M–92–164–C]

Costain Coal, Inc., P.O. Box 289, Sturgis, Kentucky 42459 has filed a petition to modify the application of 30 CFR 75.360 (preshift examinations) to its Pyro No. 9 Wheatcroft Mine (I.D. No. 15–13920) located in Webster County, Kentucky. Due to hazardous conditions, the petitioner proposes to establish a continuous monitoring station to monitor the air passing through the intersection of the First Submain North and the Fourth Submain East. The petitioner asserts that the proposed alternate method would provide at least the same measure of protection as would the mandatory standard.

8. Costain Coal, Inc.

[Docket No. M–92–165–C]

Costain Coal, Inc., P.O. Box 289, Sturgis, Kentucky 42459 has filed a petition to modify the application of 30 CFR 75.364 (weekly examination) to its Pyro No. 9 Wheatcroft Mine (I.D. No. 15–13920) located in Webster County, Kentucky. Due to hazardous conditions, the petitioner proposes to establish a continuous monitoring station to monitor the air passing through the First North Parallel. The petitioner asserts that the proposed alternate method would provide at least the same measure of protection as would the mandatory standard.

9. Costain Coal, Inc.

[Docket No. M–92–166–C]

Costain Coal, Inc., P.O. Box 289, Sturgis, Kentucky 42459 has filed a petition to modify the application of 30 CFR 75.360 (preshift examinations) to its Pyro No. 9 Wheatcroft Mine (I.D. No. 15–13920) located in Webster County, Kentucky. Due to hazardous conditions, the petitioner proposes to establish a continuous monitoring station to monitor the air passing through the William Station intake air shaft, the 3rd East, the 8th Main North intake, and the 9th Maine North entries. The petitioner asserts that the proposed alternate method would provide a least the same measure of protection as would the mandatory standard.

10. Costain Coal, Inc.

[Docket No. M–92–167–C]

Costain Coal, Inc., P.O. Box 289, Sturgis, Kentucky 42459 has filed a petition to modify the application of 30 CFR 75.364 (weekly examination) of its Baker Mine (I.D. No. 15–14492) located in Webster County, Kentucky. Due to hazardous conditions, the petitioner proposes to establish a continuous monitoring station to monitor the air passing through the No. 11 Seam Main North Parallel. The petitioner asserts that the proposed alternate method would provide at least the same measure of protection as would the mandatory standard.

11. Costain Coal, Inc.

[Docket No. M–92–168–C]

Costain Coal, Inc., P.O. Box 289, Sturgis, Kentucky 42459 has filed a petition to modify the application of 30 CFR 75.364 (weekly examination) to its Baker Mine (I.D. No. 15–14492) located in Webster County, Kentucky. Due to hazardous conditions, the petitioner proposes to establish a continuous monitoring station to monitor the air passing through the No. 13 Seam Main North Parellel. The petitioner asserts that the proposed alternate method would provide at least the same measure of protection as would the mandatory standard.

12. Helvetia Coal Co.

[Docket No. M–92–169–C]

Helvetia Coal Company, Box 179, Indiana, Pennsylvania 15701 has filed a petition to modify the application of 30 CFR 75.1405 (automatic couplers) to its Lucerne No. 6 Extension Mine (I.D. No. 36–07691) located in Indiana County, Pennsylvania. The petitioner proposes to use a metal detached bar on each motor and mantrip to uncouple haulage equipment as an alternative to using the machine mounted uncoupling device. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as would the mandatory standard.

13. Mate Creek Development, Inc.

[Docket No. M–92–170–C]

Mate Creek Development, Inc., P.O. Box 138, Sidney, Kentucky 41564 has filed a petition to modify the application of 30 CFR 75.305 (weekly examinations for hazardous conditions) to its Mine No. 2 (I.D. No. 15–10753) located in Pike County, Kentucky. The petitioner requests that granted petition for modification for New Era Coal Company, docket number M–88–247–C (now Mate Creek Development, Inc.) be amended to establish evaluation points to monitor air in the affected area of the mine with return air instead of intake air. The petitioner asserts that the proposed alternate method would provide at least same measure of protection as would the mandatory standard.

14. Minton Hickory Coal Co.

[Docket No. M–92–171–C]

Minton Hickory Coal Company, P.O. Box 922, Barbourville, Kentucky 40906 has filed a petition to modify the application of 30 CFR 75.313 (methane monitors) to its Mine No. 6 (I.D. No. 15–17317) located in Knox County, Kentucky. The petitioner proposes to use a hand-held deck-mounted continuous methane and oxygen monitor on permissible three-wheel tractors with drag bottom buckets.

15. Carey Salt Co.

[Docket No. M–92–20–M]

Carey Salt Company, P.O. Box 10, Lydia, Louisiana 70569 has filed a petition to modify the application of 30 CFR 57.22301 (atmospheric monitoring systems) to its Cote Blanche Salt Mine (I.D. No. 16–00358) located in St. Mary County, Louisiana. The petitioner proposes to conduct limited mining operations while the atmospheric monitoring system is being repaired using specific restrictions. The petitioner asserts that the proposed alternate method would provide at least the same measure of protection as would the mandatory standard.

Request for Comments

Persons interested in these petitions may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before January 14, 1993. Copies of these petitions are available for inspection t that address.

Dated: December 4, 1992.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 92–30393 Filed 12–14–92; 8:45 am]

BILLING CODE 4510–43–M

NATIONAL FOUNDATION OF THE ARTS AND HUMANITIES

Agency Information Collection Under OMB Review

AGENCY: National Endowment for the Humanities.

ACTION: Notice.

SUMMARY: The National Endowment for the Humanities (NEH) has sent to the Office of Management and Budget (OMB) the following proposals for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

DATES: Comments on this information collection must be submitted on or before January 14, 1993.

ADDRESSES: Send comments to Ms. Susan Daisey, Assistant Director, Grants Office, National Endowment for the Humanities, 1100 Pennsylvania Avenue, NW., room 310, Washington, DC 20506 (202–606–8494) and Mr. Steve Semenuk, Office of Management and Budget, New Executive Office Building, 726 Jackson Place, NW., room 3002, Washington, DC 20503 (202–395–6880).

FOR FURTHER INFORMATION CONTACT: Ms. Susan Daisey, Assistant Director, Grants Office, National Endowment for the Humanities, 1100 Pennsylvania Avenue, NW., room 310, Washington, DC 20506 (202) 606–8494 from whom copies of forms and supporting documents are available.

SUPPLEMENTARY INFORMATION: All of the entries are grouped into new forms, revisions, extensions, or reinstatements. Each entry is issued by NEH and contains the following information: (1) The title of the form; (2) the agency form number, if applicable; (3) how often the form must be filled out; (4) who will be required or asked to report; (5) what the form will be used for; (6) an estimate of the number of responses; (7) the frequency of response; (8) an estimate of the total number of hours needed to fill out the form; (9) an estimate of the total annual reporting and recordkeeping burden. None of these entries are subject to 44 U.S.C. 3504(h).

Category: Revision

Title: NEH Study Grants for College and University Teachers.

Form Number: NA.

Frequency of Collection: Annual.

Respondents: University and college faculty.

Use: The application instructions provide direction for preparing narrative and budgetary parts of applications for grant funds.

Estimated Number of Respondents: 1,816.

Frequency of Response: Once.

Estimated Hours for Respondents to Provide Information: 3.51 per respondent.

Estimated Total Annual Reporting and Recordkeeping Burden: 6,411.16 hours.

Thomas S. Kingston,

Assistant Chairman for Operations.

[FR Doc. 92–30406 Filed 12–14–92; 8:45 am]

BILLING CODE 7536–01–M

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

John F. Kennedy Assassination Records

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice to Federal agencies.

SUMMARY: In accordance with the President John F. Kennedy Assassination Records Collection Act (Pub. L. 102–526, 106 Stat. 3443) and after consultation with Government offices, NARA has created an identification aid system and established an electronic database in which to store information on each assassination record subject to review under the act.

Agencies having any records relating to the assassination of John F. Kennedy are reminded to provide agency contact point information to NARA as explained in the **Federal Register** notice dated November 23, 1992.

FOR FURTHER INFORMATION CONTACT: Mary Ronan, Access Staff, National Archives and Records Administration, 202–501–5380.

Dated: December 10, 1992.

Don W. Wilson,

Archivist of the United States.

[FR Doc. 92–30530 Filed 12–14–92; 8:45 am]

BILLING CODE 7515–01–M

NUCLEAR REGULATORY COMMISSION

Draft Regulatory Guide; Issuance, Availability

The Nuclear Regulatory Commission has issued for public comment a draft of a proposed revision to a guide in its Regulatory Guide Series. This series has been developed to describe and make available to the public such information as methods acceptable to the NRC staff for implementing specific parts of the Commission's regulations, techniques used by the staff in evaluating specific problems or postulated accidents, and data needed by the staff in its review of applications for permits and licenses.

Draft Regulatory Guide DG–1010, "Quality Assurance Program Requirements," is the proposed Revision 4 to Regulatory Guide 1.28. This guide is being developed to describe methods acceptable to the NRC staff for establishing and implementing the required quality assurance program for the design, construction, modification, and decommissioning of nuclear power plants.

This proposed draft regulatory guide would integrate current guidance for complying with appendix B, "Quality Assurance Criteria for Nuclear Power Plants and Fuel Reprocessing Plants," to 10 CFR part 50, "Domestic Licensing of Production and Utilization Facilities." In appendix B, section II, "Quality Assurance Program," states, "The quality assurance program shall provide control over activities to an extent consistent with their importance to safety." In an effort to recognize current interest in applying risk-based techniques to the regulatory framework, the NRC staff is soliciting comments on how risk-based techniques can be applied to the quality assurance program in a way that maintains safety and allows a gradation in the application of quality assurance consistent with the importance to safety of the structures, systems, and components.

The NRC staff is particularly interested in receiving comments on the impact of basing the annual evaluations on activities performed during the previous 12 months, including some type of direct observation of the operation of the suppliers' quality assurance programs (see Regulatory Position 3.2.2 of the guide).

The staff is also soliciting comments on whether this regulatory guide should be expanded to cover quality assurance programs in nuclear facilities other than power reactors and fuel reprocessing plants. Because of the general applicability of quality assurance programs, there may be an advantage in using a single regulatory guide to provide uniform guidance on quality assurance programs for a broad range of activities, thereby leading to simplication of quality assurance activities.

Commenters may submit comments in an electronic format in addition to the paper copy. Comments in an electronic format should be IMB PC DOS compatible 3.5- or 5.25-inch double-sided, double-density diskettes. Data files should be provided in WordPerfect 5.1, ASCII code, or IBM revisable-form text document content architecture.

The draft guide is being issued to involve the public in the early stages of the development of a regulatory position in this area. It has not received complete staff review and does not represent an official NRC staff position.

Public comments are being solicited on the guide. Comments should be accompanied by supporting data. Written comments may be submitted to the Regulatory Publications Branch, Division of Freedom of Information and Publications Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Copies of comments received may be examined at the NRC Public Document Room, 2120 L Street NW., Washington, DC. Comments will be most helpful if received by February 8, 1993.

Although a time limit is given for comments on these drafts, comments and suggestions in connection with (1) items for inclusion in guides currently being developed or (2) improvements in all published guides are encouraged at any time.

Regulatory guides are available for inspection at the Commission's Public Document Room, 2120 L Street NW., Washington, DC. Requests for single copies of draft guides (which may be reproduced) or for placement on an automatic distribution list for single copies of future draft guides in specific divisions should be made in writing to the U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Distribution and Mail Services Section. Telephone requests cannot be accommodated. Regulatory guides are not copyrighted, and Commission approval is not required to reproduce them.

(5 U.S.C. 552(a))

Dated at Rockville, Maryland this 24th day of November 1992.

For the Nuclear Regulatory Commission.

Brian W. Sheron,

Director, Division of Systems Research, Office of Nuclear Regulatory Research.

[FR Doc. 92–30417 Filed 12–14–92; 8:45 am]

BILLING CODE 7590–01–M

[Docket No. 50–388]

Pennsylvania Power and Light Co.; Allegheny Electric Cooperative, Inc.; Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License No. NPF–22 issued to Pennsylvania Power and Light Company and Allegheny Electric Cooperative, Inc. (the licensees) for operation of the Susquehanna Steam Electric Station (SSES), Unit 2, located in Salem Township, Pennsylvania.

The amendment would revise the Technical Specifications (TSs) to authorize operation of the Reactor Water Cleanup (RWCU) system in the current fuel cycle (Cycle 6) with the RWCU system non-regenerative heat exchanger discharge high temperature channel substituting for the inoperable 'B' RWCU High Flow isolation trip channel.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

The Commission has made a proposed determination that the amendment request involves no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

No Significant Hazards Consideration

1. This request does not involve a significant increase in the probability or consequences of an accident previously evaluated. The RWCU piping is carbon steel and is therefore resistant to IGSCC. For one operating cycle, the probability of a RWCU line break coincident with a failure to isolate the RWCU containment penetration in the section of piping which depends on it for diversity has been determined to be very low (1.1 E–6). For the balance of the RWCU piping, operation without the inoperable RWCU high flow trip channel does not increase the probability of containment isolation malfunction as analyzed in the Susquehanna IPE [Individual Plant Examination]. With regard to consequences, other redundant and diverse means of break detection are available, and have been determined to be adequate to cover the range of potential break scenarios evaluated in the FSAR [Final Safety Analysis Report]. For the section of RWCU piping that is dependent on high flow for diversity, the combined protection of the OPERABLE 'A' channel, the compensatory actions, and the Level 2 isolation will ensure that the consequences are bounded by previous FSAR evaluations. A specific evaluation concluded that radiological consequences for RWCU pipe breaks outside of containment are within the bounds of the FSAR analysis for Main Steamline Breaks outside of containment.

2. This request does not create the possibility of a new or different kind of accident from any previously evaluated. Inoperability of an isolation channel can only affect the probability or consequences of analyzed events (a leak/break with subsequent failure to isolate). It cannot create a new event.

3. The proposed change does not involve a significant reduction in a margin of safety. For the reasons described in 1 above, the 'B' high flow trip channel can be inoperable for one cycle of operation. Adequate diversity to operate the Susquehanna units has been determined to exist in the remaining OPERABLE trip channels and those channels have been determined to cover the complete range of analyzed break scenarios required. The exception is the section of piping which depends on the High Flow function for diversity. The probability of a line break of this piping coincident with a failure to isolate has been found to be sufficiently low for one cycle. Given this low probability and the one for one replacement of the inoperable high flow channel with the non-regenerative heat exchanger discharge high temperature channel which effectively provides the same leak detection capabilities, an acceptable level of RWCU isolation reliability continues to exist, and a significant reduction in safety margin will not occur.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

The Commission is seeking public comments on this proposed determination. Any comments received within thirty (30) days after the date of publication of this notice will be considered in making any final determination. The Commission will not normally make a final determination unless it receives a request for a hearing.

Written comments may be submitted by mail to the Rules and Directives Review Branch, Division of Freedom of Information and Publications Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to room P–223, Phillips Building, 7920 Norfolk Avenue, Bethesda, Maryland, from 7:30 a.m. to 4:15 p.m. Federal workdays. Copies of written comments received may be examined at the NRC Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC 20555. The filing of requests for hearing and petitions for leave to intervene is discussed below.

By January 14, 1993, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party is the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.714 which is available at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC 20555 and at the local public document room located at Osterhout Free Library, Reference Department, 71 South Franklin Street, Wilkes-Barre, Pennsylvania 18701. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board, will rule on the request and/or petition; and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made party to the proceeding; (2) the

nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later that fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide a brief explanation of the bases of the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. Petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held.

If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment.

If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

Normally, the Commission will not issue the amendment until the expiration of the 30-day notice period. However, should circumstances change during the notice period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendment before the expiration of the 30-day notice period, provided that its final determination is that the amendment involves no significant hazards consideration. The final determination will consider all public and State comments received. Should the Commission take this action, it will publish in the **Federal Register** a notice of issuance and provide for opportunity for a hearing after issuance. The Commission expects that the need to take this action will occur very infrequently.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Services Branch, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC 20555, by the above date. Where petitions are filed during the last ten (10) days of the notice period, it is requested that the petitioner promptly so inform the Commission by a toll-free telephone call to Western Union at 1-(800) 325-6000 (in Missouri 1-(800) 342-6700). The Western Union operator should be given Datagram Identification Number N1023 and the following message addressed to Charles L. Miller, Director, Project Directorate I-2, Division of Reactor Projects—I/II: petitioner's name and telephone number, date petition was mailed, plant name, and publication date and page number of this **Federal Register** notice. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to Shaw, Pittman, Potts and Trowbridge, 2300 N Street NW., Washington, DC 20037, attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the presiding Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1)(i)–(v) and 2.714(d).

For further details with respect to this action, see the application for amendment dated November 30, 1992, which is available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC 20555 and at the local public document room located at Osterhout Free Library, Reference Department, 71 South Franklin Street, Wilkes-Barre, Pennsylvania 18701.

Dated at Rockville, Maryland, this 9th day of December 1992.

For the Nuclear Regulatory Commission.

Charles L. Miller,

Director, Project Directorate I-2, Division of Reactor Projects—I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 92-30418 Filed 12-14-92; 8:45 am]

BILLING CODE 7590-01-M

SECURITIES AND EXCHANGE COMMISSION

Self-Regulatory Organizations; Applications for Unlisted Trading Privileges and of Opportunity for Hearing; Cincinnati Stock Exchange, Inc.

December 9, 1992.

The above name national securities exchange has filed applications with the Securities and Exchange Commission ("Commission") pursuant to section 12(f)(1)(B) of the Securities Exchange Act of 1934 and Rule 12f-1 thereunder for unlisted trading privileges in the following securities:

McDermott, Inc.
$2.20 Cum. Conv. Pfd., Ser. A, $1.00 Par Value (File No. 7-9768)
MCN Corp. (Holding Co.)
Common Stock, $1.00 Par Value (File No. 7-9769)
Mellon Bank Corp.
6.75% Cum. Conv. Ser. B Pfd., $1.00 Par Value (File No. 7-9770)
Mercury Finance Co.
Common Stock, $1.00 Par Value (File No. 7-9771)
Metropolitan Edison Co.

3.90% Cum. Pfd. Ser. C, $100.00 Par Value (File No. 7–9772)
Metropolitan Edison Co.
8.12% Cum. Pfd. Ser. F, $100.00 Par Value (File No. 7–9773)
Metropolitan Edison Co.
7.68% Cum. Pfd. Ser. G, $100.00 Par Value (File No. 7–9774)
Metropolitan Edison Co.
8.32% Cum. Pfd. Ser. H, $100.00 Par Value (File No. 7–9775)
Metropolitan Edison Co.
8.12% Cum. Pfd. Ser. I, $100.00 Par Value (File No. 7–9776)
Metropolitan Edison Co.
8.32% Cum. Pfd. Ser. J, $100.00 Par Value (File No. 7–9777)
Metropolitan Edison Co.
$2.00 Cum. Conv. Pfd. A, $.01 Par Value (File No. 7–9778)
MFS Multimarket Total Return Trust
Common Stock, No Par Value (File No. 7–9779)
MGM Grand, Inc.
Common Stock, $.01 Par Value (File No. 7–9780)
Mickelberry Corp.
Common Stock, $1.00 Par Value (File No. 7–9781)
Morgan (J.P.) & Co., Inc.
Adj. Rte. Cum. Pfd., Ser. A (File No. 7–9782)
Munienhanced Fund, Inc.
Common Stock, $.10 Par Value (File No. 7–9783)
Myers, (L.E.) Co. Group
Common Stock, $1.00 Par Value (File No. 7–9784)
Navistar International Corp.
Conv. Jr. Pfd., Ser. D, No Par Value (File No. 7–9785)
Navistar International Corp.
$6.00 Cum. Conv. Pfd., Ser. G, $1.00 Par Value (File No. 7–9786)
NBB Bancorp, Inc. (Holding Co.)
Common Stock, $.10 Par Value (File No. 7–9787)

These securities are listed and registered on one or more other national securities exchange and are reported in the consolidated transaction reporting system.

Interested persons are invited to submit on or before December 31, 1992, written data, views and arguments concerning the above-referenced applications. Persons desiring to make written comments should file three copies thereof with the Secretary of the Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Following this opportunity for hearing, the Commission will approve the application if it finds, based upon all the information available to it, that the extensions of unlisted trading privileges pursuant to such applications are consistent with the maintenance of fair and orderly markets and the protection of investors.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 92–30326 Filed 12–14–92; 8:45 am]

BILLING CODE 8010–01–M

Self-Regulatory Organizations; Applications for Unlisted Trading Privileges and of Opportunity for Hearing; Midwest Stock Exchange, Inc.

December 9, 1992.

The above named national securities exchange has filed applications with the Securities and Exchange Commission ("Commission") pursuant to section 12(f)(1)(B) of the Securities Exchange Act of 1934 and Rule 12f–1 thereunder for unlisted trading privileges in the following securities:

Insteel Industries, Inc.
Common Stock, No Par Value (File No. 7–9788)
Healthsource, Inc.
Common Stock, $.10 Par Value (File No. 7–9789)
Caremark International, Inc.
Common Stock, $.01 Par Value (File No. 7–9790)

These securities are listed and registered on one or more other national securities exchange and are reported in the consolidated transaction reporting system.

Interested persons are invited to submit on or before December 31, 1992, written data, views and arguments concerning the above-referenced application. Persons desiring to make written comments should file three copies thereof with the Secretary of the Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Following this opportunity for hearing, the Commission will approve the application if it finds, based upon all the information available to it, that the extensions of unlisted trading privileges pursuant to such application is consistent with the maintenance of fair and orderly markets and the protection of investors.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 92–30328 Filed 12–14–92; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–31572; File No. SR–OCC–92–34]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing of a Proposed Rule Change Relating to the Stock Loan Hedge Program

December 7, 1992.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 "Act"),[1] notice is hereby given that on October 23, 1992, The Options Clearing Corporation ("OCC" or "Commission") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared primarily by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change would permit OCC to operate a centralized facility for administering stock loan and borrow transactions between OCC clearing members and to allow certain of the stock loan and borrow positions resulting from such transactions to serve as hedges against stock option positions overlying the same stocks.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, OCC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. OCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose of the Proposed Rule Change

(a) *General.* In general, the purpose of the proposed rule change is to amend OCC's By-Laws and Rules to permit OCC to operate a centralized facility for administering stock loan and borrow transactions between OCC clearing members and to allow hedges of certain of the stock loan and borrow positions

[1] 15 U.S.C. 78s(b)(1) (1988).

resulting from such transactions against stock option positions overlying the same stocks. OCC's program for performing these services is referred to as the "Stock Loan/Hedge Program." Clearing members that are approved to participate in the program are referred to as "hedge clearing members." A clearing member that lends stock through the Stock Loan/Hedge Program is referred to as a "lending clearing member," and a clearing member that borrows stock is referred to as a "borrowing clearing member." Stocks that are eligible for the program are referred to as "eligible stocks." Only stocks that underlie stock option contracts issued by OCC will be eligible for the Stock Loan/Hedge Program.[2]

(b) *Initiation of a Stock Loan.* A hedge clearing member that has shares of a stock available to lend will identify another hedge clearing member that wishes to borrow the stock. (OCC will have no role in matching would-be lending and borrowing clearing members, but it is conceivable if the Stock Loan/Hedge Program is successful that the program might at some time in the future be expanded to give OCC a role in this process.) The two clearing members will agree on the amount of stock to be borrowed, the fee to be paid by the borrowing clearing member to the lending clearing member (this fee will be paid separately, and OCC will have no responsibility for it), and the value of the collateral to be initially paid by the borrowing clearing member to OCC and by OCC to the lending clearing member. Regulation T of the Board of Governors of the Federal Reserve System specifies that the value of the collateral for a stock loan cannot be less than 100% of the market value of the stock at the close on the preceding day, and OCC's proposed rules reflect this requirement. Initially, OCC will require that collateral be all cash, but this requirement may be changed to allow other types of collateral permitted by Regulation T as OCC develops experience with the program.

After the two clearing members have agreed to the terms of the transaction, the lending clearing member, prior to a time established by OCC, will transfer the stock by book-entry[3] to OCC's account at a "correspondent depository."[4] Midwest Securities Trust Company ("MSTC") will act as the initial correspondent depository, but OCC is prepared to establish correspondent relationships with other depositories if circumstances warrant. The transfer will be made pursuant to instructions identifying the borrowing clearing member and specifying the collateral to be received by the lending clearing member. Upon receiving notice from the correspondent depository of its receipt of the stock, OCC will direct the depository to re-deliver the stock to the borrowing clearing member against payment of the required collateral amount.

Money settlement with respect to the initiation of stock loans will also take place through the correspondent depository's facilities. OCC's right to receive cash from the borrowing clearing member will net against its obligation to pay cash to the lending clearing member. If the borrowing clearing member fails to make money settlement with the correspondent depository for the day on which the stock transfers take place, the correspondent depository will reverse the transfers.[5] If the borrowing clearing member makes money settlement with the correspondent depository each transfer will constitute under the rules of the correspondent depository "an entry on the books" of the correspondent depository (*i.e.*, the transaction will become final).[6]

OCC's rules will define the term "stock loan" as a "matched pair of securities contracts for the loan of eligible stock made through the Stock Loan/Hedge Program, with one such securities contract being between the lending clearing member and the Corporation as borrower and the second such securities contract being between the Corporation as lender and the borrowing clearing member."[7] OCC's rules will provide that OCC will be deemed to have "accepted" a stock loan and to have become a party to the stock loan at the time that "a transfer of the eligible stock that is the subject of such stock loan from the Corporation to the borrowing clearing member constitutes a final entry on the books of the correspondent depository"[8] (*i.e.*, when the borrowing clearing member has completed money settlement with the correspondent depository). OCC's rules will further provide that commencing at the time that OCC is deemed to have accepted a stock loan "the role of the Corporation in respect of the stock loan shall be that of a principal, and the Corporation shall have the position of borrower to the lending clearing member and lender to the borrowing clearing member" and that thereafter the rights and obligations of the two clearing members shall be against OCC.[9]

The position of a lending clearing member in respect of a stock loan is referred to as a "stock loan position" and the position of a borrowing clearing member in respect of a stock loan is referred to as a "stock borrow position." OCC's proposed rules require that stock loan positions held for the account of a customer (*i.e.*, one other than a market-maker or specialist) be carried in the lending clearing member's customers' account, and permit stock loan positions held for the account of a market-maker or a specialist to be carried in the lending clearing member's customers' account.[10] OCC's proposed rules also require that stock loan positions held for the account of a non-customer be carried in a firm account.[11] Accordingly, clearing members participating in the Stock Loan/Hedge Program will comply with paragraph (a)(2) of Commission Rules 8c–1 and 15c2–1 because OCC's By-Laws and Rules will prohibit the commingling of securities carried for the account of customers with securities

[2] In order for a stock to qualify as an eligible stock, the stock must also be eligible for deposit at the "correspondent depository" (as defined in the text below), and OCC must not have made a determination, pursuant to proposed paragraph 2(c) of Article XXI of its By-Laws, to terminate all outstanding stock loans relating to the security.

[3] All transfers in the Stock Loan/Hedge Program will be by book-entry.

[4] A "correspondent depository" is a securities depository at which OCC has an account for processing Stock Loan/Hedge Program activity.

[5] See, *e.g.*, MSTC Article III, Rule 1, particularly Section 2 ("Right to Reverse Book-Entry Movements").

[6] See, *e.g.*, MSTC Article III, Rule 1, Section 2.

[7] Proposed paragraph 1(S)(9) of Article I of OCC's By-Laws. The term "securities contract" is used in the definition of "stock loan," among other reasons, to make clear that the contracts between OCC and a lending clearing member and between OCC and a borrowing clearing member are each a securities contract for purposes of the Bankruptcy Code. (Under section 741(7) of the Bankruptcy Code, 11 U.S.C. 741(7), a securities contract means a contract for the loan of a security.) OCC's ability to make the Stock Loan/Hedge Program available in the manner described in the proposed rule change is contingent upon the applicability to stock loans of the special provisions of the Bankruptcy Code that protect the closeout activities of securities clearing agencies from attack by the trustee for a bankrupt clearing member. The proposed definition of the term stock loan is intended to make clear that the Stock Loan/Hedge Program is within the purview of these special provisions.

[8] Proposed paragraph 2(b) of Article XXI of OCC's By-Laws.

[9] Proposed paragraph 2(a) of Article XXI of OCC's By-Laws.

[10] Proposed paragraph 5(c) of Article XXI of OCC's By-Laws. OCC's definition of the term "customer" is set out at paragraph 1(C)(16) of Article I of its By-Laws. The definition parallels the definition of the term in Commission Rules 8c–1 and 15c2–1 (17 CFR 240.8c–1 and 17 CFR 240.15c2–1, respectively).

[11] Proposed paragraph 5(e) of Article XXI of OCC's By-Laws. OCC's definition of the term "non-customer" is set out in paragraph 1(N)(1) of Article I of its By-Laws. The definition includes the clearing member itself and all other persons that are excluded from the definition of "customer" in Commission Rules 8c–1 and 15c2–1.

carried for the account of non-customers.

OCC's proposed rules require each lending clearing member to instruct OCC as to the account in which the stock loan position resulting from a stock loan is to be maintained and require each borrowing clearing member to instruct OCC as to the account in which the stock borrow position resulting from a stock loan is to be carried.[12] OCC's proposed rules permit any lending clearing member or borrowing clearing member to submit "standing instructions" to the effect that all of the clearing member's stock loan positions or stock borrow positions, as applicable, are to be carried in a specified account except as the clearing member may otherwise specify with respect to particular stock loan positions or stock borrow positions, as applicable.[13] Proposed paragraph 5(b) of Article XXI of OCC's By-Laws states that an instruction, including a standing instruction, from a lending clearing member to OCC identifying a customers' account or a market-maker's or specialist's account as the account in which a stock loan position is to be carried shall constitute a written notice pursuant to paragraph (f) of Commission Rules 8c–1 and 15c2–1 that the loaned stock to which the stock loan position relates is carried for the account of a customer and that the hypothecation of such loaned stock to OCC does not contravene any provision of either such Rule. This provision is intended to put clearing members on notice with respect to the notice and certification requirements of paragraph (f) of Commission Rules 8c–1 and 15c2–1 as these requirements apply to the Stock Loan/Hedge Program and to permit clearing members to satisfy these requirements in an efficient manner.[14]

The language of OCC's market-maker's (specialist's) account agreement currently does not accommodate stock loans. Accordingly, OCC's proposed rules specify that stock loan and borrow positions may not be maintained in a master-maker's or specialist's account unless the market-maker or specialist has entered into a market-maker's (specialist's) account agreement that authorizes stock loan and borrow positions to be maintained in the account, or in the case of a combined market-makers' or specialists' account unless each market-maker or specialist that is a participant in the account has entered into a market-maker's (specialist's) account agreements that authorizes stock loan and borrow positions to be maintained in the account.[15] OCC is planning to submit revised versions of the various forms of market-maker's (specialist's) account agreement to the Commission in a separate proposed rule change in the near future. In addition to authorizing stock loan and borrow positions to be maintained in market-maker's or specialist's accounts, the revised versions will contain a variety of other updating changes.

(c) *Margin treatment.* Stock loan positions and stock borrow positions will both be subject to two types of margin. First, lending clearing members and borrowing clearing members will be required to pay or entitled to receive daily mark-to-market payments. These payments will cause the collateral value held by the lending clearing members to be adjusted daily so that the collateral value is always equal to the closing market price for the loaned stock on the preceding trading day.[16]

Second, lending clearing members and borrowing clearing members will both be required to deposit margin with OCC to cover OCC's risk that the market will move against a stock loan position or a stock borrow position during a day and that the clearing member carrying the position will fail before making the required mark-to-market payment on the next business day. The margin required to be deposited with OCC in respect to stock loan positions and stock borrow positions in analogous to additional margin on short stock option positions, and it is referred to in OCC's proposed rules and hereinafter as "additional margin."

OCC will compute additional margin in respect of stock loan and borrow positions as follows.[17] Stock loan and borrow positions will be treated as being in the same "class group" as stock options overlying the same eligible stock. Stock loan and borrow positions in each account relating to an eligible stock will be summed to produce a net loan or net borrow position for the account. Additional margin will be determined on a combined basis on the net stock loan or borrow position and any stock options in the same class group in the account. Additional margin will be determined on the remaining stock loan and borrow positions in the account on a "gross" basis by (1) multiplying the applicable margin interval times the number of shares in the remaining gross stock loan position times the prior trading day's closing price ("marketing price"), (2) multiplying the applicable margin interval times the number of shares in the remaining gross stock loan position times the prior trading day's closing price ("marking price"), (2) multiplying the applicable margin interval times the number of shares in the remaining gross stock borrow position times the marketing price, and (3) summing the two resulting margin requirements together. The additional margin requirement on the gross stock loan and borrow positions will then be added to the combined additional margin requirement for the stock option positions and the net stock loan or borrow position to determine the total additional margin requirement for the class group.[18]

If a hedge clearing member is carrying no long or short options positions in a class group in an account in which the clearing member is carrying any stock loan position or stock borrow position, OCC's margin system will assign a "margin interval"[19] for five percent to the stock underlying the stock loan and borrow position in the account. If the clearing member is carrying any long or short options in the same class group in its account, OCC's margin system will assign the same margin interval to the stock underlying the stock loan and borrow positions in the account that OCC uses in respect of that stock as the underlying security for options positions.[20]

OCC will first collect additional margin with respect to a stock loan from the lending clearing member and the borrowing clearing member on the morning of the first business day after the stock loan is initiated. This means

[12] Proposed OCC Rule 2201(d).

[13] Proposed paragraph 5(f) of Article XXI of OCC's By-Laws. Paragraph 5(f) expressly states that any stock loan position or stock borrow position that is carried in an account pursuant to a standing instruction shall nonetheless comply with all applicable provisions of OCC's By-Laws and Rules.

[14] Proposed paragraph 5(b) of Article XXI of OCC's By-Laws also requires each lending clearing member to represent, with respect to each stock loan position that is to be carried in a customers' account or a market-maker's or specialist's account, that the loaned stock to which the stock loan position relates is not a "fully paid security" or an "excess margin security" within the meaning of Commission Rule 15c3–3.

[15] Proposed Interpretation .01 to Section 5 of Article XXI of OCC's By-Laws.

[16] Mark-to-market payments are described in proposed OCC Rule 2203.

[17] Additional margin for stock loan and borrow positions is described in revised OCC Rule 601.

[18] Stock loan and borrow positions will also be taken into account in calculating the alternative "minimum additional margin requirement" described in OCC Rule 601(c)(1)(C)(6) in parallel to the way in which they will be taken into account in calculating the ordinary additional margin requirement.

[19] The margin interval is the maximum daily change in the marking price of the underlying security, upwards or downwards, assumed by OCC for purposes of calculating additional margin.

[20] Proposed Interpretation .06 to OCC Rule 601 sets out the treatment of the margin interval for stock loan and borrow positions.

that OCC will have no margin on deposit if a lending clearing member or a borrowing clearing member defaults after a stock loan becomes final but before margin is collected on the next business day. OCC has concluded that the other elements of its protection and back-up systems, particularly its surveillance systems and its recourse to the clearing fund deposits of clearing members, should be adequate to protect it against this risk.

(d) *Termination of stock loans.* A stock loan will be terminable by either the borrowing clearing member or the lending clearing member. The borrowing clearing member will be able to terminate a stock loan by delivering the loaned stock to OCC's account at a correspondent depository with instructions identifying the lending clearing member to which the stock is to be redelivered. Upon receiving notice of the delivery, OCC will instruct the correspondent depository to redeliver the loaned stock to the lending clearing member against payment by the lending clearing member of the then current value of the collateral, which will be equal to the preceding trading day's closing value for the stock. A lending clearing member will be required to give notice of termination to OCC five business days in advance of the day on which it wishes the termination to be settled, in order to give the borrowing clearing member time to obtain the stock that it will be required to deliver. OCC will notify the borrowing clearing member of the termination on the day that it receives the notice from the lending clearing member. Commencing at a time specified by OCC on the day appointed for settlement, the lending clearing member will have the right to buy in the loaned stock if the borrowing clearing member has failed to make delivery prior to that time. OCC will continue to require the parties to a stock loan to make and receive market-to-market payments and will continue to require additional margin with respect to both the stock loan position and the stock borrow position, until the stock loan is actually terminated.

(e) *Close-out of stock loans.* If OCC suspends a hedge clearing member, commencing at the time of the suspension OCC will not accept any new stock loan transactions to which the suspended clearing member is a party.[21] OCC also will assess the open stock loan and borrow positions of the suspended clearing member and close them out (by offset if appropriate) or keep them open (and establish additional hedges for them if appropriate) as appears to be appropriate in the circumstances.[22] In general, OCC's proposed rules relating to open stock loan and borrow positions of a suspended clearing member are designed to make the set of possible actions that are currently available to OCC in respect of open options positions also available to OCC in respect of stock loan and borrow positions.

With respect to stock loans that are in the process of being terminated at the time that the clearing member is suspended, OCC will direct the non-suspended clearing member to buy in or sell out the loaned stock for the account of OCC unless OCC concludes that the buy in or sell out may be deferred because arrangements adequate to protect OCC and the non-suspended clearing members have been made.[23]

(f) *Clearing fund provisions.* Article VII of OCC's By-Laws and OCC Rule 1001 will be amended to make clear that the stock clearing fund will be available to make good losses suffered by OCC as a result of the Stock Loan/Hedge Program and to make clear that for purposes of clearing fund deposit requirements of hedge clearing members, the "average daily aggregate margin requirement" is the aggregate margin for the stock option product group, which includes stock loan positions. OCC Rule 1001 also will be amended to specify that open stock loan obligations of clearing members will be taken into account in calculating their respective stock clearing funding obligations. This will be done essentially by determining the total number of shares of stock underlying each stock loan position and each stock borrow position and dividing each such number by the unit of trading applicable to options contracts overlying that same stock to arrive at "options contract equivalent" numbers that can be used for clearing fund calculation purposes.

(g) *OCC authority to terminate stock loans.* Proposed new paragraph 2(c) of article XXI of OCC's By-Laws gives OCC the authority to terminate the outstanding stock loans relating to one or more particular eligible stocks upon determination that circumstances warrant such action. OCC anticipates that this authority would rarely, if ever, be needed. However, OCC believes that it should have this authority, in part because stock loans, unlike options, will have an indefinite duration, and in the absence of this authority, OCC would be unable to be certain as to when the Stock Loan/Hedge Program could be terminated if OCC simply stopped accepting new stock loans.

2. Statutory Basis for the Proposed Rule Change

The proposed changes to OCC's By-Laws and Rules are consistent with the purposes and requirements of section 17A of the Act because, as compared to the current environment in which stock loan and borrow transactions are effected without a centralized facility acting as a principal, the proposed changes provide for the prompt and accurate clearance and settlement of stock loans with enhanced safeguarding of securities and funds related thereto, and for reduced exposure to counterparty default. The proposed changes accomplish this by applying procedures and protections to stock loans that have been developed by OCC in the clearance and settlement of options and that have been demonstrated to be efficient, effective, and safe in that context.

B. Self-Regulatory Organization's Statement on Competition

OCC does not believe that the proposed rule change would impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were not and are not intended to be solicited by OCC with respect to the proposed rule change, and none have been received by OCC.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within thirty-five days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to ninety days of such date if it finds such longer period of be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange

[21] Proposed OCC Rule 2209(a).

[22] Proposed OCC Rules 22099(b), (c), and (d).

[23] Proposed OCC Rule 2210.

Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of OCC. All submissions should refer to File No. SR–OCC–92–34 and should be submitted by January 6, 1993.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 92–30330 Filed 12–14–92; 8:45 am]

BILLING CODE 8010–01–M

Self-Regulatory Organizations; Applications for Unlisted Trading Privileges and of Opportunity for Hearing; Philadelphia Stock Exchange, Inc.

December 9, 1992.

The above named national securities exchange has filed applications with the Securities and Exchange Commission ("Commission") pursuant to section 12(f)(1)(B) of the Securities Exchange Act of 1934 and Rule 12f–1 thereunder for unlisted trading privileges in the following securities:

Western Gas Resources, Inc.
2.28 Cum. Pfd. Stock, $.10 Par Value (File No. 7–9758)
Pratt Hotel Corporation
Common Stock, "When Issued", $.01 Par Value (File No. 7–9759)
Caremark International, Inc.
Common Stock, $.01 Par Value (File No. 7–9760)
SPI Holding, Inc.
Class B Common Stock, "When Issued", $.01 Par Value (File No. 7–9761)
Healthsource, Inc.
Common Stock, $.10 Par Value (File No. 7–9762)
Interdigital Communications Corporation
Common Stock, $.01 Par Value (file No. 7–9763)
Insteel Industries, Inc.
Common Stock, No Par Value (File No. 7–9764)
Capstead Mortgage Corporation
$.126 Cum. Conv. Pfd Stock Series B, $.10 Par Value (File No. 7–9765)
Taubman Centers, Inc.
Common Stock, $0.01 Par Value (File No. 7–9766)

These securities are listed and registered on one or more other national securities exchange and are reported in the consolidated transaction reporting system.

Interested persons are invited to submit on or before December 31, 1992, written data, views and arguments concerning the above-referenced application. Persons desiring to make written comments should file three copies thereof with the Secretary of the Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549. Following this opportunity for hearing, the Commission will approve the application if it finds, based upon all the information available to it, that the extensions of unlisted trading privileges pursuant to such applications are consistent with the maintenance of fair and orderly markets and the protection of investors.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 92–30329 Filed 12–14–92; 8:45 am]

BILLING CODE 8010–01–M

[Rel. No. IC–19149; 812–7933]

Crestfunds, Inc., et al.; Notice of Application

December 8, 1992.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of application for exemption under the Investment Company Act of 1940 (the "Act").

APPLICANTS: Crestfunds, Inc. (formerly Bayshore Funds, Inc.) (the "Fund"), Capitoline Investment Services Incorporated (the "Investment Adviser"), and Fidelity Distributors Corporation (the "Distributor").

RELEVANT ACT SECTIONS: Conditional order requested under section 6(c) of the Act for an exemption from sections 18(f), 18(g), and 18(i).

SUMMARY OF APPLICATION: Applicants seek a conditional order under section 6(c) that would permit the Fund to issue separate classes of shares representing interests in the same portfolio of securities.

FILING DATE: The application was filed on June 3, 1992, and amended on September 18, 1992 and November 23, 1992. By supplemental letter dated December 7, 1992, counsel, on behalf of applicants, agreed to file a further amendment during the notice period to make certain technical changes. This notice reflects the changes to be made to the application by such further amendment.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on January 4, 1993, and should be accompanied by proof of service on the applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street, NW., Washington, DC 20549. The Fund and the Distributor, 82 Devonshire Street, Boston, Massachusetts 02109; the Investment Adviser, 1919 East Main Street, Richmond, Virginia 23219.

FOR FURTHER INFORMATION CONTACT: John V. O'Hanlon, Staff Attorney, at (202) 272–3922, or Elizabeth G. Osterman, Branch Chief, at (202) 272–3016 (Office of Investment Company Regulation, Division of Investment Management).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch.

Applicants' Representations

1. The Fund is an open-end management investment company registered under the Act. The fund currently consists of ten series of shares. The series represent interests in three separate money market portfolios—Cash Reserve Fund, U.S. Treasury Money Fund, and Tax Free Money Fund (collectively, the "Money Market Portfolios"). The Fund also consists of seven additional series of shares representing interests in four bond portfolios and three equity portfolios (the Money Market Portfolios, bond portfolios, and equity portfolios are referred to herein collectively as the "Portfolios").

2. The Investment Adviser is a wholly owned subsidiary of Crestar Bank, which is a subsidiary of Crestar Financial Corporation. The Fund compensates the Investment Adviser

pursuant to an investment advisory agreement. Crestar Bank acts as the Fund's transfer agent and custodian, and is compensated by the Fund pursuant to a transfer agency agreement and a custodian contract.

3. The Distributor is a wholly owned subsidiary of FMR Corp. The Distributor sells shares of the Portfolios as agent on behalf of the fund, and assists in the Portfolios' administration and operation.

4. Existing shares of the Portfolios ("Existing Shares") are intended for investment of short-term monies held in trust, fiduciary, advisory, agency, custodial, or similar accounts held by financial institutions or business organizations. Existing Shares are sold and redeemed daily at net asset value without a sales or redemption charge, and are subject to a distribution plan adopted pursuant to rule 12b–1 under the Act (the "Administrative 12b–1 Plan").

5. Applicants seek an exemptive order that would permit the Fund to offer multiple classes of shares representing interests in the same Portfolio. Each class of new shares ("New Shares") would be identical in all respects to each class of Existing Shares, except for its class designation, the allocation of certain expenses, voting rights, and exchange privileges. Each portfolios' investment objectives, policies, and restrictions would apply to the New Shares of any Portfolio to the same extent as to the Existing Shares of such Portfolio.

6. Each Portfolio may offer several classes of New Shares (a) in connection with a distribution and service plan adopted pursuant to rule 12b–1 (a "Distribution and Service Plan"); and/or (b) in connection with a non-rule 12b–1 shareholder services plan (a "Shareholder Services Plan"). The Fund may offer an unlimited number of different classes of shares, either in connection with one or more of the plans described above or without any plan. All classes of shares issued by the Fund in connection with any order granted in response to the application will comply with all representations and conditions contained in the application.[1]

[1] Applicants request that any relief also apply to any future series of the Fund and any other future investment company, or series thereof, advised by the Investment Adviser or any person directly or indirectly controlling, controlled by, or under common control with the Investment Adviser (collectively, "Future Funds"). Applicants state that any such Future Fund issuing classes of shares pursuant to any order granted in response to the application will comply with all representations and conditions contained in the application.

7. Under the Administrative 12b–1 Plan adopted on behalf of Existing Shares of the Portfolios, the Portfolio pays the Distributor a monthly fee at an annual rate of up to .15% of the average net assets of such Portfolio. Each Administrative 12b–1 Plan also provides that the Investment Adviser is authorized to make payments out of its own resources, including the payments it receives under its investment advisory agreement, to third parties who engage in the sale of shares or who render shareholder support services.

8. Under the Distribution and Service Plan, either the Fund (on behalf of a Portfolio) or the Distributor (such election to be at the discretion of the Fund) would enter into servicing agreements ("Service Agreements") with banks, broker-dealers, or other institutions ("Service Organizations") that would provide certain account administration services to the customers of the Service Organizations ("Customers"), which Customers from time to time beneficially own shares that are offered pursuant to the plan. The Distribution and Service Plan would be used with respect to Service Organizations authorized to provide distribution and distribution-related liaison services. Service Agreements under the Distribution and Service Plan would provide for an asset-based sales charge to compensate Service Organizations or their affiliates, if appropriate, for the distribution of shares and the provision of certain additional shareholder liaison services to Customers. Payments to a Service Organization and to the Distributor pursuant to the Distribution and Service Plan would not exceed 0.75% (or such other amount as may be permitted under applicable regulations of the National Association of Securities Dealers, Inc. ("NASD")) per annum of the average daily net asset value of the Distribution and Service Plan shares beneficially owned by Customers of the Service Organization with respect to which services and assistance are provided under the Distribution and Service Plan. The amount of such payments to Service Organizations currently is expected to be a maximum of 0.50% per annum. The level of payments permitted under the Distribution and Service Plan shall be changed only pursuant to approval by the shareholders of the affected class of the Fund.

9. Under the Shareholder Service Plan, either the Fund (on behalf of a Portfolio) or the Distributor (such election to be at the discretion of the Fund) would enter into Service Agreements with Service Organizations concerning the provision of certain account administration services to Customers, which Customers from time to time beneficially own shares that are offered pursuant to the plan. The Shareholder Services Plan would be used with respect to Service Organizations authorized to provide only personal and account maintenance services. Service payments pursuant to the Shareholder Services Plan would not exceed 0.25% (or such other amount as may be permitted under applicable NASD regulations) per annum of the average daily net asset value of the shares beneficially owned by Customs of the Service Organization with respect to which personal and account maintenance services are performed under a Shareholder Services Plan. Such service payments currently are expected to be a maximum of 0.25% per annum.

10. Service Organizations may charge other fees to Customers who are the beneficial owners of Distribution and Service Plan shares or Shareholder Services Plan shares in connection with their customer accounts, subject to the procedures set forth in conditions 6, 7, and 8. Such fees would be in addition to any amounts received by the Service Organization under a Service Agreement. Under the terms of the Service Agreements, Service Organizations would be required to provide Customers with a schedule of fees that relate to the investment of their assets in Distribution and Service Plan shares or Shareholder Services Plan shares.

11. The expense of payments under the Administrative 12b–1 Plan, Distribution and Service Plan, and Shareholder Services Plan would be borne entirely by the beneficial owners of the class of shares of the Fund to which the particular plan relates. In the event that a Distribution and Service Plan and a Shareholder Service Plan are adopted with respect to a single class of shares, the Directors will apply the analysis required under rule 12b–1(d) to the aggregate amount paid under such plans in order to assure that, to the extent that the plans may be deemed to overlap in some respects, compensation shall not be duplicative as a result of the use of both plans.

12. The gross income of all Portfolios will be allocable among the classes of shares based upon the relative net asset values. Expenses of the Fund cannot be attributed directly to any one Portfolio will be allocated to each Portfolio based on the relative net assets of such Portfolio. Certain expenses may be attributable to a particular Portfolio, but not to a particular class ("Portfolio

Expenses"). All such Portfolio Expenses will be allocated to each class of shares in a Portfolio on the basis of the relative net asset values of the classes of that Portfolio. All expenses incurred by a class of shares ("Class Expenses") will be borne on a *pro rata* basis by the outstanding shares of such class. Because of the differing Class Expenses that may be borne by each class of shares, the net income of (and dividends payable to) each class may be different from the net income of (and dividends payable to) the other classes of shares in the same Portfolio.

13. Each class of the shares may be exchanged only for shares of the same class in another Portfolio. Notwithstanding the foregoing, exchanges will be permitted among classes should a shareholder cease to be eligible to purchase shares of the original class by reason of a change in the shareholder's status. This situation might occur, for example, when an investor who beneficially owned shares held by an institution becomes the holder of legal title by reason of a distribution from the institutional account. Such distributions may be occasioned by a termination of a trust and distribution of the corpus of the trust to beneficiaries. An individual would become the holder of shares designed for institutions, and the individuals may desire the services offered by Service Organizations in substitution of the services formerly provided by the trustees of such trust. Exchanges will be limited to within the same "group of investment companies" as that term is defined in rule 11a-3 under the Act.

Applicants' Legal Analysis

1. Applicants seek an exemption from sections 18(g), 18(f)(1), and 18(i) to the extent that the proposed issuance and sale of New Shares may result in a senior security, as defined by section 18(g), the issuance and sale of which would be prohibited by section 18(f)(1), and to the extent the allocation of voting rights in connection with New Shares may violate the provisions of 18(i).

2. Applicants assert that the proposed issuance of New Shares does not raise any of the legislative concerns that section 18 of the Act was designed to ameliorate. The proposal does not involve borrowings and does not affect the Fund's existing assets or reserves. Each class of shares will be redeemable at all times. No class of shares will have preference or priority over any other class of the Fund in the usual sense (that is, no class will have distribution or liquidation preferences to particular assets and no class will be protected by any reserve or other account).

3. Applicants state that the proposed arrangement will not increase the speculative character of the shares in a Portfolio, since each class of shares will participate in all of such Portfolio's income and expenses on the basis of the relative net assets of each class (with the exception of the payments and other expenses which are attributed solely to a particular class).

4. Applicants assert that owners of each class of shares may be relieved of a portion of the fixed costs normally associated with investing in mutual funds since such costs would, potentially, be spread over a greater number of shares than they would be otherwise. Applicants believe that the proposed allocation of expenses and voting rights relating to the plans is equitable and would not discriminate against any group of shareholders. In addition, such arrangements should not give rise to any conflict of interest because the rights and privileges of each class of shares are substantially identical.

5. Applicants assert that the requested exemption is appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

Applicants' Conditions

Applicants agree that the following conditions may be imposed in any SEC order granting the requested relief.[2]

1. Each class of shares of a Portfolio will represent interests in the same portfolio of investments and be identical in all respects, except as set forth below. The only differences among the classes of shares of a Portfolio will relate solely to one or more of the following: (a) The method of financing certain Class Expenses, which are limited to any or all of the following: (i) transfer agent fees identified by applicants as being attributable to a specific class of shares; (ii) printing and postage expenses related to preparing and distributing materials such as shareholder reports, prospectuses and proxy statements to current shareholders of a specific class; (iii) SEC and Blue Sky registration fees incurred by a class of shares; (iv) the expense of administrative personnel and services as required to support the shareholders of a specific class; (v) Directors' fees or expenses incurred as a result of issues relating to one class of shares; and (vi) accounting expenses relating to one class of shares; (b) expenses assessed to a class pursuant to a Shareholder Services Plan and/or 12b-1 Plan (whether an Administrative 12b-1 Plan or a Distribution and Service Plan or both) with respect to such class; (c) the fact that the classes will vote separately with respect to the Fund's Shareholder Services Plan and/or any 12b-1 Plan; (d) the different exchange privileges of the classes of shares; and (e) the designation of each class of shares of the Fund. Any additional incremental expenses not specifically identified above which are subsequently identified and determined to be properly allocated to one class of shares shall not be so allocated unless and until approved by the Commission.

2. The Directors of the Fund, including a majority of the independent Directors, will approve the offering of additional classes of New Shares (the "Multi-Class System"). The minutes of the meetings of the Directors regarding the deliberations of the Directors with respect to the approvals necessary to implement the Multi-Class System will reflect in detail the reasons for the Directors' determination that the proposed Multi-Class System is in the best interest of both the Fund and its shareholders.

3. The initial determination of the Class Expenses that will be allocated to a particular class and any subsequent changes thereto will be reviewed and approved by a vote of the Board of Directors, including a majority of the independent Directors. Any persons authorized to direct the allocation and disposition of monies paid or payable by the Fund to meet Class Expenses shall provide to the Board of Directors, and the Directors shall review at least quarterly, a written report of the amounts so expended and the purposes for which such expenditures were made.

4. On an ongoing basis, the Directors of the Fund, pursuant to their fiduciary responsibilities under the Act and otherwise, will monitor the Fund for the existence of any material conflicts among the interests of the classes of shares. The Directors, including a majority of the independent Directors, shall take such action as is reasonably necessary to eliminate any such conflicts that may develop. The distributor and the investment adviser will be responsible for reporting any potential or existing conflicts to the Directors. If a conflict arises, the distributor and the investment adviser,

[2] One of the conditions in the application (condition 5), which relates to shareholder approval of rule 12b–1 plans, is no longer required for exemptive relief permitting multiple classes of shares. Any order issued granting such relief would not be subject to this condition. The conditions in this notice have been renumbered to reflect the deletion of the condition.

at their own cost, will remedy such conflict up to and including establishing a new registered management investment company.

5. The Distributor will adopt compliance standards as to when each class of shares may be sold to particular investors. Applicants will require all persons selling shares of the Fund to agree to conform to such standards.

6. The Shareholder Services Plans will be adopted and operated in accordance with the procedures set forth in rule 12b-1(b) through (f) as if the expenditures made thereunder were subject to rule 12b-1, except that shareholders need not enjoy the voting rights specified in rule 12b-1. In evaluating the Shareholder Services Plans, the Directors will specifically consider whether (a) such plans are in the best interest of the applicable classes and their respective shareholders, (b) the services to be performed pursuant to the Plans are required for the operation of the applicable classes, (c) the Service Organizations can provide services at least equal, in nature and quality, to those provided by others, including the Fund, providing similar services, and (d) the fees for such services are fair and reasonable in the light of the usual and customary charges made by other entities, especially non-affiliated entities, for services of the same nature and quality.

7. Each Service Agreement entered into pursuant to a Shareholder Services Plan will contain a representation by the Service Organization that any compensation payable to the Service Organization in connection with the investment of Customers' assets in the Fund (a) will be disclosed by it to the Customers, (b) will be authorized by its Customers, and (c) will not result in an excessive fee to the Service Organization.

8. Each Service Agreement entered into pursuant to a Shareholder Services Plan will provide that, in the event an issue pertaining to a Shareholder Services Plan is submitted for shareholder approval, the Service Organization will vote any shares held of its own account in the same proportion as the vote of those shares held for its Customers' accounts.

9. The Directors will receive quarterly and annual statements concerning the amounts expended under the Shareholder Services Plans and any 12b–1 Plans and the related Service Agreements complying with paragraph (b)(3)(ii) of rule 12b–1, as it may be amended from time to time. In the statements, only expenditures properly attributable to the sale or servicing of a particular class of shares will be used to justify any distribution or servicing fee charged to that class. Expenditures not related to the sale or servicing of a particular class will not be presented to the Directors to justify any fee attributable to that class. The statements, including the allocations upon which they are based, will be subject to the review and approval of the independent Directors in the exercise of their fiduciary duties.

10. Dividends paid by the Fund with respect to each class of its shares, to the extent any dividends are paid, will be calculated in the same manner, at the same time, on the same day, and will be in the same amount per outstanding share, except that Administrative or Service Payments made by a class under a Plan and any Class Expenses will be borne exclusively by that class.

11. The methodology and procedures for calculating the net asset value and dividends and distributions of the classes and the proper allocation of expenses among the classes have been reviewed by an expert (the "Expert") who has rendered a report to the applicants that such methodology and procedures are adequate to ensure that such calculations and allocations would be made in an appropriate manner. On an ongoing basis, the Expert, or an appropriate substitute Expert, will monitor the manner in which the calculations and allocations are being made and, based upon such review, will render at least annually a report to the Fund that the calculations and allocations are being made properly. The reports of the Expert will be filed as part of the periodic reports filed with the Commission pursuant to section 30(a) and 30(b)(1) of the Act. The work papers of the Expert with respect to such reports, following request by the Fund (which the Fund agrees to provide), will be available for inspection by the Commission staff upon written request to the Fund for such work papers by a senior member of the Division of Investment Management, limited to the Director, an Associate Director, the Chief Accountant, the Chief Financial Analyst, and Assistant Director, and any Regional Administrators or Associate and Assistant Administrators. The initial report of the Expert is a "Special Purpose" report on the "Design of a System" and ongoing reports would be "Special Purpose" reports on the "Design of a System and Certain Compliance Tests" as defined and described in SAS No. 44 of the AICPA, as it may be amended from time to time, or in similar auditing standards as may be adopted by the AICPA from time to time.

12. Applicants have adequate facilities in place to ensure implementation of the methodology and procedures for calculating the net asset value and dividends and distribution of the classes of shares and the proper allocation of expenses among the classes and this representation has been concurred with by the Expert in the initial report referred to in condition 11 above and will be concurred with by the Expert, or an appropriate substitute Expert, on an ongoing basis at least annually in the ongoing reports referred to in condition 11 above. Applicants will take immediate corrective action if this representation is not concurred in by the Expert or appropriate substitute Expert.

13. The prospectuses of each class of shares will contain a statement to the effect that a salesperson and any other person entitled to receive compensation for selling or servicing Fund Shares may receive different compensation with respect to one particular class of shares over another in the Fund.

14. The conditions pursuant to which the exemptive order is granted and the duties and responsibilities of the Directors with respect to the Multi-Class Systems will be set forth in guidelines which will be furnished to the Directors.

15. The Fund will disclose the respective expenses, performance data, distribution arrangements, services, fees, sales loads, deferred sales loads, and exchange privileges applicable to each class of shares in every prospectus, regardless of whether all classes of shares are offered through each prospectus. The Fund will disclose the respective expenses and performance data applicable to all classes of shares in every shareholder report. To the extent that any advertisement or sales literature describes the expenses or performance data applicable to any class of shares of a Portfolio, it will also disclose the respective expenses and/or performance data applicable to all classes of shares of such Portfolio. The information provided by Applicants for publication in any newspaper or similar listing of the Fund's net asset value or public offering price will present each class of shares separately.

16. Applicants acknowledge that the grant of the exemptive order requested by the application will not imply Commission approval, authorization of, or acquiescence in any particular level of payments that the Fund may make pursuant to its Administrative 12b–1 Plan, Distribution and Service Plan or Shareholder Services Plan in reliance on the exemptive order.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 92–30325 Filed 12–14–92; 8:45 am]

BILLING CODE 8010–01–M

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster Loan Area #2608]

Alabama (And Contiguous Counties in Georgia and Tennessee); Declaration of Disaster Loan Area

Clay, Dekalb, and Madison Counties and the contiguous counties of Cherokee, Cleburne, Coosa, Etowah, Jackson, Limestone, Marshall, Morgan, Talladega, Tallaposa, and Randolph in Alabama; Chattooga, Dade and Walker Counties in Georgia; and Franklin and Lincoln Counties in Tennessee constitute a disaster area as a result of damages caused by high winds and tornadoes which occurred on November 22, 1992. Applications for loans for physical damage as a result of this disaster may be filed until the close of business on February 1, 1993 and for economic injury until the close of business on September 3, 1993 at the address listed below: U.S. Small Business Administration, Disaster Area 2 Office, One Baltimore Place, Suite 300, Atlanta, GA 30308, or other locally announced locations.

The interest rates are:

	Percent
For Physical Damages:	
Homeowners with credit available elsewhere	8.000
Homeowners without credit available elsewhere	4.000
Businesses with credit available elsewhere	8.000
Businesses and non-profit organizations without credit available elsewhere	4.000
Others (including non-profit organizations) with credit available elsewhere	7.625
For Economic Injury:	
Businesses and small agricultural cooperatives without credit available elsewhere	4.000

The numbers assigned to this disaster for physical damage are 260812 for Alabama, 26012 for Georgia and 261012 for Tennessee. For economic injury the numbers are 777100 for Alabama, 777200 for Georgia and 777300 for Tennessee.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008)

Dated: December 3, 1992.

Patricia Saiki,

Administrator.

[FR Doc. 92–30381 Filed 12–14–92; 8:45 am]

BILLING CODE 8025–01–M

[Declaration of Disaster Loan Area #2607]

Florida; Declaration of Disaster Loan Area

Dade County and the contiguous counties of Broward, Collier, and Monroe in the State of Florida constitute a disaster area as a result of damages caused by flooding and severe storms which occurred on November 18, 1992. Applications for loans for physical damage as a result of this disaster may be filed until the close of business on February 1, 1993, and for economic injury until the close of business on September 3, 1993, at the address listed below:

U.S. Small Business Administration, Disaster Area 2 Office, One Baltimore Place, suite 300, Atlanta, GA 30308, or other locally announced locations.

The interest rates are:

	Percent
For Physical Damage:	
Homeowners with credit available elsewhere	8.000
Homeowners without credit available elsewhere	4.000
Businesses with credit available elsewhere	8.000
Businesses and non-profit organizations without credit available elsewhere	4.000
Others (including non-profit organizations) with credit available elsewhere	7.625
For Economic Injury:	
Businesses and small agricultural cooperatives without credit available elsewhere	4.000

The number to this disaster for physical damage is 260706 and for economic injury the number is 777000.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008)

Dated: December 3, 1992.

Patricia Saiki,

Administrator.

[FR Doc. 92–30377 Filed 12–14–92; 8:45 am]

BILLING CODE 8025–01–M

[Declaration of Disaster Loan Area #2596; Amdt. 2]

Hawaii; Declaration of Disaster Loan Area

The above-numbered Declaration is hereby amended, effective November 9, 1992, to extend the termination date for filing applications for physical damage to December 12, 1992. All other information remains the same, i.e., the termination date for filing applications for economic injury is June 14, 1993.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008).

Dated: November 10, 1992.

Bernard Kulik,

Assistant Administrator for Disaster Assistance.

[FR Doc. 92–30383 Filed 12–14–92; 8:45 am]

BILLING CODE 8025–01–M

[Declaration of Disaster Loan Area #2611]

North Carolina (and a Contiguous County in Virginia); Declaration of Disaster Loan Area

Orange and Stokes Counties and the contiguous counties of Alamance, Caswell, Chatham, Durham, Forsyth, Guilford, Person, Rockingham, Surry and Yadkin in the State of North Carolina and Patrick County in the State of Virginia constitute a disaster area as a result of damages caused by severe storms, high winds and tornadoes which occurred on November 23, 1992. Applications for loans for physical damage as a result of this disaster may be filed until the close of business on February 1, 1993 and for economic injury until the close of business on September 3, 1993 at the address listed below:

U.S. Small Business Administration, Disaster Area 1 Office, 360 Rainbow Blvd. South, 3rd Floor, Niagara Falls, NY 14303, or other locally announced locations.

The interest rates are:

	Percent
For Physical Damage:	
Homeowners with credit available elsewhere	8.000
Homeowners without credit available elsewhere	4.000
Businesses with credit available elsewhere	8.000
Businesses and non-profit organizations without credit available elsewhere	4.000
Others (including non-profit organizations) with credit available elsewhere	7.625
For Economic Injury:	
Businesses and small agricultural cooperatives without credit available elsewhere	4.000

The numbers assigned to this disaster for physical damage are 261112 for North Carolina, and 261212 for Virginia. For economic injury the numbers are 777400 for North Carolina and 777500 for Virginia.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008)

Dated: December 3, 1992.

Patricia Saiki,

Administrator.

[FR Doc. 92–30378 Filed 12–14–92; 8:45 am]

BILLING CODE 8025–01–M

[Declaration of Disaster Loan Area #2605]

Texas; Declaration of Disaster Loan Area

Maverick County and the contiguous counties of Dimmit, Kinney, Uvalde, Webb, and Zavala in the State of Texas constitute a disaster area as a result of damages caused by severe thunderstorms and flooding which occurred on July 21–22, 1992. Applications for loans for physical damage as a result of this disaster may be filed until the close of business on January 29, 1993 and for economic injury until the close of business on August 30, 1993 at the address listed below: U.S. Small Business Administration, Disaster Area 3 Office, 4400 Amon Carter Blvd., Suite 102, Ft. Worth, TX 76155, or other locally announced locations.

The interest rates are:

For Physical Damage	*Percent*
Homeowners with credit available elsewhere	8.000
Homeowners without credit available elsewhere	4.000
Businesses with credit available elsewhere	8.000
Businesses and non-profit organizations without credit available elsewhere	4.000
Others (including non-profit organizations) with credit available elsewhere	8.500
For Economic Injury:	
Businesses and small agricultural cooperatives without credit available elsewhere	4.000

The number assigned to this disaster for physical damage is 260506 and for economic injury the number is 776700.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008)

Dated: November 30, 1992.

Patricia Saiki,

Administrator.

[FR Doc. 92–30382 Filed 12–14–92; 8:45 am]

BILLING CODE 8025–01–M

[Declaration of Economic Injury Disaster Loan Area #7766]

Washington; Declaration of Disaster Loan Area

Clallam County and the contiguous county of Jefferson in the State of Washington constitutes an Economic Injury Disaster Loan Area due to the effects of El Nino on the Salmon fishing industry in the Neah Bay area during 1992. Eligible small businesses without credit available elsewhere and small agricultural cooperatives without credit available elsewhere may file applications for economic injury assistance until the close of business on August 13, 1993 at the address listed below:

U.S. Small Business Administration, Disaster Area 4 Office, P.O. Box 13795, Sacramento, CA 95853–4795, or other locally announced locations. The interest rate for eligible small businesses and small agricultural cooperatives is 4 percent.

(Catalog of Federal Domestic Assistance Program No. 59002)

Dated: November 3, 1992.

Patricia Saiki,

Administrator.

[FR Doc. 92–30379 Filed 12–14–92; 8:45 am]

BILLING CODE 8025–01–M

Women's Business Development Act; Federal Assistance

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: Federal Assistance to Individuals or Enterprises Eligible Under the Women's Business Ownership Act of 1991, Public Law 102–191. Federal Assistance will be provided to develop training and counseling centers for women business owners under the Women's Business Development Act of 1991, Program Announcement No. OWBO–93–005. The Program announcement is intended to assist SBA's Office of Women's Business Ownership train and counsel women wanting to start or expand businesses. The Women's business Development Act of 1991, Public Law 102–191, seeks applicants who are experienced in conducting programs or on-going efforts designed to impart or upgrade the business skills of women business owners or potential owners. The applicant must commence a demonstration project within a minimum amount of time. The applicant must provide training and services to a representative number of women who are both socially and economically disadvantaged. Each applicant shall submit a three year plan on proposed fundraising and training activities and may receive financial assistance for a maximum of three years per site, subject to availability of funds. As a public/private partnership, successful applicants will match SBA funding in the first year with one non-Federal dollar for each 2 Federal dollars; in the second year, one non-Federal dollar for each Federal dollar; and in the third and final year, two non-Federal dollars for each Federal dollar. The training activities must include, but need not be limited to: (1) Financial assistance, including training and counseling in how to apply for and secure business credit and investment capital, preparing and presenting financial statements and managing cash flow and other financial operations of a business concern; (2) management assistance; and (3) marketing assistance. Up to one-half of the non-Federal matching assistance may be in the form of in-kind contributions which are budget line items only, including but not limited to office equipment and office space. The Small Business Administration may disburse up to 25 percent of each year's Federal share awarded to a recipient organization after notice of the award has been issued and before the non-Federal matching funds are obtained. If any recipient of assistance fails to obtain the required non-Federal contribution during any year of any project, it shall not be eligible thereafter for advance disbursements during the remainder of that project or for any other project for which it is or may be funded.

DATES: Applicants must submit their application proposal on or before January 8, 1993 at 4 p.m., Eastern Standard Time, at the SBA office specified in the program announcement.

FOR FURTHER INFORMATION CONTACT: Harriet Fredman, Senior Program Representative at 202/205–6673 or Sally Murrell, Agreement Officer at 202/205–6621.

Dated: December 8, 1992.

Patricia F. Saiki,

Administrator.

[FR Doc. 92–30375 Filed 12–14–92; 8:45 am]

BILLING CODE 8025–01–M

Northeastern Capital Corp.; Notice of Surrender of License

[License No. 01/02–0062]

Notice is hereby given that, pursuant to § 107.105 of the Small Business Administration (SBA) Rules and

Regulations governing Small Business Investment Companies (13 CFR 107.105 (1992)), Northeastern Capital Corporation, 209 Church Street, New Haven, CT 06510, incorporated under the laws of the State of Connecticut has surrendered its license, No. 01/02–0062 issued by the SBA on April 1, 1983.

Northeastern Capital Corporation has complied with all conditions set forth by SBA for surrender of its license. Therefore, under the authority vested by the Small Business Investment Act of 1958, as amended, and pursuant to the above-cited Regulation, the license of Northeastern Capital Corporation is hereby accepted and it is no longer licensed to operate as a Small Business Investment Company.

(Catalog of Federal Domestic Assistance Program No. 59.011, Small Business Investment Companies)

Wayne S. Foren,

Associate Administrator for Investment.

[FR Doc. 92–30373 Filed 12–14–92; 8:45 am]

BILLING CODE 8025–01–M

The Capital Fund; Notice of Application to Operate as a Small Business Investment Company Licensee

[Applicant No. 99000072]

Notice is hereby given that an application has been filed with the Small Business Administration (SBA) pursuant to § 107.102 of the Regulations governing small business investment companies (13 CFR 107.102 (1992)) by The Capital Fund (TCF), for a license to operate as a small business investment company (SBIC) under the Small Business Investment Act of 1958 (the Act), as amended (15 U.S.C. 661 et seq.).

The proposed officers, directors, and shareholders of the Applicant are as follows:

Name and address	Title
Robert F. Dailey, 7021 North Ridge Road, Lansing, Michigan 48917.	Chairman.
Barry A. Wilson, 7840 West Willow Highway, Grand Ledge, Michigan 48837.	President, Director.
Craig A. Woodman, 315 Greentree Lane, Ada, Michigan 49301.	Senior Vice President, Treasurer, Director.
Stephen L. Sandstedt, 2127 Montego Drive, Lansing, Michigan 48912.	Vice President, Secretary, Director.
Dana W. Tousley, 2206 Rockdale, Lansing, Michigan 48917.	Director.
Capital BIDCO Inc., 6412 Centurion Drive, Suite 150, Lansing, Michigan 48917	100% Shareowner.

Capital BIDCO Inc., a corporation organized and existing under the laws of the State of Michigan, owns 100% of the issued and outstanding capital stock of The Capital Fund.

The applicant, TCF, a Michigan corporation will begin operations with $2,500,000 paid-in capital and paid-in surplus. TCF will conduct its activities primarily in the State of Michigan but will consider investments in businesses in other areas in the United States.

Matters involved in SBA's consideration of the application include the general business reputation and character of the proposed owners and management, and the probability of successful operation of the company under their management, including adequate profitability and financial soundness in accordance with the Small Business Investment Act of 1958, as amended, and the SBA Rules and Regulations.

Notice is further given that any person may, not later than 30 days from the date of publication of this Notice, submit written comments on the proposed applicant. Any such communication should be addressed to the Associate Administrator for Investment, Small Business Administration, 409 Third Street SW., Washington, DC 20416.

A copy of this notice shall be published in a newspaper of general circulation in Lansing, Michigan.

(Catalog of Federal Domestic Assistance Program No. 59.011, Small Business Investment Companies)

Dated: December 4, 1992.

Wayne S. Foren,

Associate Administrator for Investment.

[FR Doc. 92–30372 Filed 12–14–92; 8:45 am]

BILLING CODE 8025–01–M

[License No. 03/03–0181]

Meridian Venture Partners, Filing of Application for Approval of Conflict of Interest Transaction Between Associates

Notice is hereby given that Meridian Venture Partners (MVP) 259 Radnor-Chester Road, Radnor, PA 19087, a Federal Licensee under the Small Business Investment Act of 1958, as amended (Act), has filed an application pursuant to § 107.903 of the Regulations governing small business investment companies (13 CFR 107.903 (1992)), for approval of a conflict of interest transaction. MVP desires to invest $409,998 in Preferred Stock in Mother's Work, Inc., 1307 Noble Street, Philadelphia, PA 19123.

MVP is a limited partnership and has four general partners, one of which has been a director of Mothers Work since 1985. The conflict of interest arises under § 107.903(b)(1) of CFR part 13 because a general partner of MVP is also a director of Mothers Work, the small business concern in which MVP proposes to invest. Consequently, the proposed transaction falls within the purview of § 107.903 of the Regulations, and requires a written exemption granted by SBA. In addition, three of the four General partners of MVP collectively own 2.14% of the stock of Mothers Work, Inc.

Notice is hereby given that any interested person may, not later than 30 days from the date of publication of this Notice, submit written comments on the proposed transaction to the Associate Administrator for Investment, Small Business Administration, 409 3rd Street, SW., Washington, DC 20416.

A copy of this Notice shall be published in the newspaper of general circulation in the Philadelphia area.

(Catalog of Federal Domestic Assistance Program No. 59.011, Small Business Investment Companies)

Dated: December 1, 1992.

Wayne S. Foren,

Associate Administrator for Investment.

[FR Doc. 92–30371 Filed 12–14–92; 8:45 am]

BILLING CODE 8025–01–M

[Application No. 99000075]

Opportunity Capital Partners II, L.P.; Application for a Small Business Investment Company License

An application for a license to operate a small business investment company (SBIC) under the provisions of the Small Business Investment Act of 1958, as amended (15 U.S.C. 661 *et seq.*) has been filed by Opportunity Capital Partners II, L.P. (Applicant), 39650 Liberty Street, suite 425, Fremont, California 94538, with the Small Business Administration pursuant to 13 CFR 107.102 (1992).

The proposed individual General Partners of the General Partner (GP), a general partnership and the General Partner and Limited Partner of the Applicant are as follows:

		Ownership
Thompson Capital Management, 39650 Liberty Street, Suite 425, Fremont, CA 94538.	General Partner	1%
J. Peter Thompson, 223 E. Las Palmas Ave., Fremont, CA 94539	Managing General Partner of the GP	
Joyce M. Thompson, 223 E. Las Palmas Ave., Fremont, CA 94538	General Partner	
Bank of America NT&SA, 555 California Street, San Francisco, CA 94104	Sole Limited Partner	99%
BankAmerica Corporation, 555 California Street, San Francisco, CA 94104	Sole Shareholder of Limited Partner	

The Applicant, a California limited partnership, is expected to begin operations with $1,556,161 of private capital. The Applicant will conduct its activities primarily in the State of California.

Matters involved in SBA's consideration of the Application include the general business reputation and character of the proposed owners and management, and the probability of successful operations of the company under their management, including profitability and financial soundness, in accordance with the Small Business Investment Act and the SBA Rules and Regulations.

Notice is further given that any person may, not later than 30 days from the date of publication of this Notice, submit written comments on the proposed SBIC to the Associate Administrator for Investment, Small Business Administration, 409 3rd Street, SW., Washington, DC 20416.

A copy of the Notice shall be published in a newspaper of general circulation in Fremont, California.

(Catalog of Federal Domestic Assistance Program No. 59.011, Small Business Investment Companies)

Dated: November 18, 1992.

Wayne S. Foren,

Associate Administrator for Investment.

[FR Doc. 92–30374 Filed 12–14–92; 8:45 am]

BILLING CODE 8025–01–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Advisory Circular 25.963–1; Fuel Tank Access Covers

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of issuance of advisory circular.

SUMMARY: This notice announces the issuance of Advisory Circular (AC) 25.963–1, Fuel Tank Access Cover. This AC sets forth a means of compliance with the provisions of part 25 of the Federal Aviation Regulations (FAR) dealing with the certification requirements for fuel tank access covers on turbine powered transport category airplanes.

DATES: Advisory Circular 25.963–1 was issued by the Acting Manager, Transport Airplane Directorate, Aircraft Certification Service, ANM–100, on July 29, 1992.

HOW TO OBTAIN COPIES: A copy may be obtained by writing to the U.S. Department of Transportation, M–443.2, Subsequent Distribution Unit, Washington, DC 20590.

Issued in Renton, Washington, on December 7, 1992.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service, ANM–100.

[FR Doc. 92–30413 Filed 12–14–92; 8:45 am]

BILLING CODE 4910–13–M

RTCA, Inc., Special Committee 169; Aeronautical Data Link Application; Meeting

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., Appendix I), notice is hereby given for the eighth meeting of Special Committee 169 to be held December 9–11, 1992, at the RTCA conference room, 1140 Connecticut Avenue, NW., suite 1020, Washington, DC 20036 commencing at 9:30 a.m.

The agenda for this meeting is as follows:

(1) Chairman's introductory remarks;

(2) Review of meeting agenda;

(3) Approval of the summary of the seventh meeting held on July 30–31, 1992;

(4) Report of Air Traffic Services Data Link Communications Working Group (WG–1) activities;

(5) Report of System Architecture and Dependencies Working Group (WG–2) activities;

(6) Report on GNSS Data Link Requirements;

(7) Context Management Application Design Status Review;

(8) Report on ATN manual review;

(9) Other Business;

(10) Date and place of next meeting.

Attendance is open to the interested public but limited to space available. With the approval of the Chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the RTCA Secretariat, 1140 Connecticut Avenue, NW., Suite 1020, Washington, DC 20036; (202) 833–9339. Any member of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on December 1, 1992.

Joyce J. Gillen,

Designated Officer.

[FR Doc. 92–30412 Filed 12–14–92; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF THE TREASURY

[Number 16–11]

Directive; Treasury Financial Manual

December 8, 1992.

1. *Delegation.* By the authority granted to the Fiscal Assistant Secretary by Treasury Order (TO) 101–05, the Commissioner, Financial Management Service, is hereby delegated the authority to revise the Treasury Financial Manual.

2. *Redelegation.* The authority delegated by this directive may be redelegated to personnel of the Financial Management Service.

3. *Cancellation.* Treasury Directive 16–11, "Promulgation of the Treasury Financial Manual," dated September 22, 1986, is superseded.

4. *Authority.* TO 101–05, "Reporting Relationships and Supervision of Officials, Offices and Bureaus, Delegation of Certain Authority, and Order of Succession in the Department of the Treasury."

5. *Office of Primary Interest.* Office of the Fiscal Assistant Secretary.

Gerald Murphy,

Fiscal Assistant Secretary.

[FR Doc. 92–30327 Filed 12–14–92; 8:45 am]

BILLING CODE 4810–25–M

UNITED STATES INFORMATION AGENCY

Culturally Significant Objects Imported for Exhibition

Determination

Notice is hereby given of the following determination: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985, 22 U.S.C.

2459), Executive Order 12047 of March 27, 1978 (43 FR 13359, March 29, 1978), and Delegation Order No. 85–5 of June 27, 1985 (50 FR 27393, July 2, 1985), I hereby determine that the objects to be included in the exhibit, "Irish Watercolours and Drawings from the National Gallery of Ireland" (see list [1]), imported from abroad for the temporary exhibition without profit within the United States, are of cultural significance. These objects are imported pursuant to a loan agreement with the foreign lenders. I also determine that the temporary exhibition or display of the listed exhibit objects at the Boston College Museum of Art, Chestnut Hill, Massachusetts from on or about October 2, 1993 to on or about December 12, 1993, is in the national interest.

Public notice of this determination is ordered to be published in the **Federal Register**.

Dated: December 9, 1992.

Alberto J. Mora,

General Counsel.

[FR Doc. 92–30349 Filed 12–14–92; 8:45 am]

BILLING CODE 8230–01–M

[1] A copy of this list may be obtained by contacting Mr. Paul W. Manning of the Office of the General Counsel of USIA. The telephone number is 202/619–6827, and the address is room 700, U.S. Information Agency, 301 Fourth Street, SW., Washington, DC 20547.

Sunshine Act Meetings

Federal Register
Vol. 57, No. 241
Tuesday, December 15, 1992

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice of a Matter To Be Added to the Agenda for Consideration at an Agency Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that the following matter will be added to the "discussion agenda" for consideration at the open meeting of the Board of Directors of the Federal Deposit Insurance Corporation scheduled to be held at 10:00 a.m. on Tuesday, December 15, 1992, in the Board Room on the sixth floor of the FDIC Building located at 550–17th Street, NW., Washington, DC:

Report on the status of pending regulations to be issued pursuant to the Federal Deposit Insurance Corporation Improvement Act of 1991.

Requests for further information concerning the meeting may be directed to Mr. Robert E. Feldman, Deputy Executive Secretary of the Corporation, at (202) 898–6757.

Dated: December 11, 1992.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Deputy Executive Secretary.

[FR Doc. 92–30513 Filed 12–11–92; 1:19 pm]

BILLING CODE 6714–01–M

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

TIME AND DATE: 12:00 noon, Monday, December 21, 1992.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, NW., Washington, D.C. 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.
2. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452–3204. You may call (202) 452–3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Dated: December 11, 1992.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 92–30531 Filed 12–11–92; 3:18 pm]

BILLING CODE 6210–01–M

NUCLEAR REGULATORY COMMISSION

DATE: Weeks of December 14, 21, 28, 1992 and January 4, 1993.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Open and closed.

MATTERS TO BE CONSIDERED:

Week of December 14

Thursday, December 17

10:00 a.m.
Briefing on Role of AEOD in Oversight of Operating Reactors (Public Meeting)
(Contact: Edward Jordan, 301–492–4848)

11:30 a.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

Friday, December 18

9:00 a.m.
Briefing on Investigative Matters (Closed—Ex. 5 and 7)

10:00 a.m.
Briefing by DOE on HLW Program (Public Meeting)
(Contact: Linda Desell, 202–586–1462)

2:00 p.m.
Briefing on License Renewal Industry Initiatives and Resources (Public Meeting)
(Contact: Dennis Crutchfield, 301–504–1199)

Week of December 21—Tentative

Monday, December 21

9:00 a.m.
Discussion of Management-Organization and Internal Personnel Matters (Closed—Ex. 2 and 6)

10:00 a.m.
Briefing on Waste Management—International Safety Convention (Closed—Ex. 9)

11:30 a.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

Friday, December 18

9:00 a.m.
Briefing on Investigative Matters (Closed—Ex. 5 and 7)

10:00 a.m.
Briefing by DOE on HLW Program (Public Meeting)
(Contact: Linda Desell, 202–586–1462)

2:00 p.m.
Briefing on Status of General Atomic—Sequoyah Fuels Facility (Public Meeting)
(Contact: Richard Cunningham, 301–504–3426)

Tuesday, December 22

2:30 p.m.
Briefing on Status of U.S. Nuclear Initiatives with Russia and Ukraine (Closed—Ex. 1)

Week of December 28—Tentative

Tuesday, December 29

11:30 a.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

Week of January 4—Tentative

Tuesday, January 5

11:30 a.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

ADDITIONAL INFORMATION: By a vote of 4–0 (Commissioner de Planque not participating) on December 7, the Commission determined pursuant to U.S.C. 552b(e) and § 9.107(a) of the Commission's rules that "Affirmation of Final Rule on Exclusion of Attorneys from Interviews Under Subpoena" and by a vote of 5–0 that "Affirmation of Final Rule Amending 10 CFR Part 52", (Public Meeting) be held on December 8 and on less than one week's notice to the public.

Note: Affirmation sessions are initially scheduled and announced to the public on a time-reserved basis. Supplementary notice is provided in accordance with the Sunshine Act as specific items are identified and added to the meeting agenda. If there is no specific subject listed for affirmation, this means that no item has as yet been identified as requiring any Commission vote on this date.

To verify the Status of Meeting Call (Recording)—(301) 504–1292.

CONTACT PERSON FOR MORE INFORMATION: William Hill (301) 504–1661.

Dated: December 10, 1992.

William M. Hill, Jr.,

SECY Tracking Officer, Office of the Secretary.

[FR Doc. 92–30484 Filed 12–11–92; 1:28 pm]

BILLING CODE 7590–01–M

Corrections

Federal Register
Vol. 57, No. 241
Tuesday, December 15, 1992

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 92N–0440]

Food Labeling Regulations Implementing the Nutrition Labeling and Education Act of 1992

Correction

In notice document 92–28980 beginning on page 56347 in the issue of Friday, November 27, 1992, make the following corrections:

1. On page 56348, in the first column, in the third line, "July 20, 1992" should read "July 28, 1992".

2. On the same page, in the same column, in the fourth line, "[57 FR 32058]" should read "[57 FR 33283]".

BILLING CODE 1505–01–D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

[BPD–758–FNC]

RIN 0938–AF82

Medicare Programs; Fee Schedule for Physicians' Services for Calendar Year 1993

Correction

In notice document 92–28184 beginning on page 55914 in the issue of Wednesday, November 25, 1992, on page 56167, in the FR Doc. line appearing at the end of the document, "92–28184" should read "92–28186".

BILLING CODE 1505–01–D

federal register

Tuesday
December 15, 1992

Part II

Department of Transportation

Office of the Secretary
Federal Aviation Administration
Federal Highway Administration
Federal Railroad Administration
Federal Transit Administration
Research and Special Programs Administration

Drug and Alcohol Testing Programs; Proposed Rules

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Federal Highway Administration

Federal Railroad Administration

Federal Transit Administration

Research and Special Programs Administration

RIN 2120–AE43; 2125–AC85; 2130–AA43; 2132–AA38; 2137–AC21

Limitation on Alcohol use by Transportation Workers

AGENCIES: Federal Aviation Administration (FAA), the Federal Highway Administration (FHWA), the Federal Railroad Administration (FRA), the Federal Transit Administration (FTA) and the Research and Special Programs Administration (RSPA), DOT.

ACTION: Proposed rule; common preamble.

SUMMARY: This document is a common preamble to five proposed alcohol testing rules being published by several operating administrations of the Department of Transportation (FAA, FHWA, FRA, FTA, and RSPA) elsewhere in today's issue of the **Federal Register**. Four of these rules are required by the Omnibus Transportation Employee Testing Act of 1991. All of them should enhance the overall safety of the transportation industry and the public.

DATES: Comments on the NPRMs must be received on or before April 14, 1993. Late-filed comments will be considered to the extent practicable.

ADDRESSES: Comments on the operating administrations' NPRMs should be mailed to the operating administrations at the addresses contained in the NPRMs following this common preamble. Comments on the alcohol testing procedures NPRM should be mailed to the address contained in that NPRM. Each rulemaking has a separate docket. Since there are common requirements, bases and purposes for the rules, each DOT organization involved may rely on comments submitted to the dockets of the other participating DOT organizations as necessary for developing the final rules. If a DOT organization relies upon a comment directed to the docket of another DOT organization, it will place a copy of that comment in its own docket. To ensure that comments applicable to more than one operating administration are read by each, those comments should be sent to each affected operating administration's docket.

FOR FURTHER INFORMATION CONTACT: Gwyneth Radloff, Office of the General Counsel, Department of Transportation, (202) 366–9305, 400 7th Street, SW., Washington, DC 20590, with respect to the overall Departmental effort. For information concerning a particular NPRM, contact the individual(s) listed under the **FOR FURTHER INFORMATION CONTACT** section for that NPRM. The full texts of this document and all the other related DOT rulemaking documents appearing in today's **Federal Register** are electronically available through DOT's Anti-Drug Information Center (ADIC). Call 1–800–CAL–DRUG for further information.

SUPPLEMENTARY INFORMATION:

Summary

FAA, FHWA, FRA, and FTA are proposing rules to implement the Omnibus Transportation Employee Testing Act of 1991 ("the Act"), which requires alcohol testing programs and changes to the drug testing programs in the aviation, motor carrier, rail, and mass transit industries in the interest of public safety. RSPA is proposing to apply similar requirements to the pipeline transportation industry using existing statutory authority to ensure application of the drug and alcohol testing requirements to all safety-sensitive employees in that industry. The maritime industry has not been included in the proposals published in today's **Federal Register**; the U.S. Coast Guard (USCG) has some existing regulations on alcohol misuse and the industry would have difficult problems with the implementation of additional requirements similar to those being proposed by the five other operating administrations (OAs).

The five proposals generally have the same requirements and common language to a great extent, but are not exactly the same. Intended substantive differences (where industry-specific differences are necessary or to comport with existing regulatory format or statutory requirements) are explained in the preambles to the individual OA proposals.

In general, the proposed rules would prohibit covered employees from performing safety-sensitive functions: (1) When test results indicate a breath alcohol concentration of 0.04 or greater; (2) Within four hours after using alcohol; (3) While using alcohol on the job; (4) During 8 hours following an accident if their involvement has not been discounted as a contributing factor in the accident or until they are tested; (5) While behavior and appearance are characteristic of alcohol misuse or their ability to perform safety-sensitive functions is adversely affected by alcohol use; and (6) If they refuse to submit to required alcohol tests. Employers would have to remove from a safety-sensitive function any covered employee who violates any of these prohibitions until he or she has met the conditions for returning to a safety-sensitive function. Slightly different rules would apply with respect to an employee who is found to have an alcohol concentration of 0.02 or greater but less than 0.04. The proposed rules would require employers to conduct pre-employment, reasonable suspicion, post-accident, random, return-to-duty and follow-up alcohol testing with evidential breath testing devices. They also would impose reporting and recordkeeping requirements and provide for alcohol misuse information for employees, supervisor training, and referral of employees to employee assistance programs (EAPs).

Each of the OA notices of proposed rulemaking (NPRMs) developed as part of this effort has common language, to the extent possible, in recognition of the common elements of the statute and the problem being addressed. This will ease compliance for those companies, employers and third-party service providers that may be subject to the rules of more than one of the OAs.

This document is a common preamble jointly issued by each of the five OAs and provides the background for and an overview of the general, common elements of their proposed rules. It is incorporated by reference as part of the preamble for each individual OA's NPRM; additional modal-specific preambles have been issued by each of the OAs to provide an explanation of any differences from, or additions to, the common language. The following related documents appear in today's **Federal Register**:

(1) This common preamble;

(2) An Office of the Secretary (OST) NPRM on alcohol testing procedures and conforming changes to the existing drug testing procedures that is incorporated by reference into the OAs' NPRMs;

(3) The modal-specific OA preambles and proposed alcohol misuse prevention rule language for the: FAA; FHWA; FRA (also includes drug changes); FTA; and RSPA;

(4) FAA, FRA, and FHWA advance notices of proposed rulemaking (ANPRMs) seeking public comment on application of alcohol and drug testing requirements to foreign operators in the

United States in the aviation, rail, and motor carrier industries;

(5) An FTA NPRM that would impose on recipients of Federal funding in the transit industry drug testing requirements similar to those in the other transportation industries;

(6) FAA, FHWA, FRA, RSPA and USCG NPRMs that would require submission of drug test results to the Department's new Management Information System (MIS) (FTA's MIS proposal is included in its drug testing NPRM.);

(7) An FHWA NPRM that proposes changes to its existing drug rule in order to conform to the Act, including extending coverage to intrastate truck and motorcoach operations (FAA will be separately proposing, in the near future, conforming changes to its existing drug testing rule.); and

(8) A DOT-wide ANPRM that seeks public comment concerning whether there are less costly alternatives to the current random drug testing programs for the aviation, motor carrier, rail, mass transit, pipeline and maritime industries that can maintain an adequate level of deterrence and detection of illegal drug use.

Draft regulatory evaluations that analyze the costs and benefits of and the alternatives considered for each of the OA NPRMs and for the NPRM on testing procedures (part 40) have been placed in the individual dockets. We request public comment on these draft analyses and solicit additional information that would aid each OA in developing its final rule and regulatory evaluation.

The Department plans to conduct one or more public hearings on these proposed rules. The hearing dates and locations will be announced in a separate **Federal Register** notice.

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Background

The Omnibus Transportation Employee Testing Act of 1991

On October 28, 1991, President Bush signed the Omnibus Transportation Employee Testing Act of 1991 ("the Act"). (Pub. L. 102–143, Title V). The Act requires the Department to prescribe regulations within one year that require testing of safety-sensitive employees in the aviation, highway, rail, and mass transit industries and in the Federal Aviation Administration for use, in violation of law or Federal regulation, of alcohol and drugs listed in the Controlled Substances Act. The Act preempts inconsistent state and local laws, except certain state criminal laws, in the aviation, highway, and mass transit industries and requires that the regulations be consistent with U.S. international obligations. It specifically mandates, among other things, privacy in collection techniques, incorporation of the Department of Health and Human Services' (DHHS) mandatory guidelines for drug testing and comparable safeguards for alcohol testing, quantified confirmation of any initial positive result, collection of split samples of body fluid specimens, confidentiality of test results, and scientifically-random selection of employees to be tested. It requires pre-employment, random, post-accident, and reasonable suspicion testing; periodic testing is discretionary. Regulations prescribed under the Act must include provisions for the identification of, and opportunity for treatment for, covered employees in need of assistance due to misuse of alcohol or controlled substances. The Act states that current federally-mandated programs are unaffected by the new statutory requirements.

At the time of enactment of the Act, several OAs already had implemented programs designed to address the use and misuse of drugs and alcohol by transportation workers, and the Department had published an ANPRM on alcohol misuse by employees in the DOT-regulated transportation industries (54 FR 46326, November 2, 1989). In 1988, six of the Department's OAs: FAA; FHWA; FRA; FTA, formerly the Urban Mass Transportation Administration, (UMTA); USCG; and RSPA, issued drug testing rules for members of their regulated industries (53 FR 47002 et. seq., Nov. 21, 1988). (The FTA rule was overturned by a Federal appellate court in January 1990 on the grounds that the agency lacked statutory authority to issue nationwide standards requiring drug testing.) The rules generally apply

to persons performing safety-sensitive and security-related functions in commercial operations. The Department also published in 1988, and revised in 1989, a Department-wide drug testing procedures rule (49 CFR part 40) that governs testing under all the OA rules (53 FR 47002, Nov. 21, 1988; 54 FR 49854, Dec. 1, 1989). As noted above, the Act requires certain changes to the existing drug testing rules (*e.g.*, it requires split samples and extends coverage to intrastate truck and motorcoach operations under the FHWA rule). It also directs FTA to issue drug testing rules.

In addition to the requirements discussed above, the Act requires alcohol and drug testing for certain DOT employees. Air traffic controllers employed by the FAA are the largest group of employees subject to this testing (they are already subject to drug testing under an existing DOT policy). Another example of DOT employees subject to coverage is vehicle drivers who must have a Commercial Driver's License (CDL). The Department is developing a DOT Order (an internal program document) to conform the Department's drug testing program for its own employees to the requirements of the Act and to implement alcohol testing.

Regulatory History

During the drug testing rulemakings, we noted on numerous occasions that alcohol is a drug. We recognized alcohol's wide use, its addictive nature, and the number of transportation-related deaths and injuries that result every year from its misuse. We also realized that, for numerous reasons, the solution to the alcohol problem may be very different from that concerning other drugs, such as cocaine or marijuana. For that reason, with one exception, the OAs did not include alcohol among the list of substances to be tested for under the drug testing regulations. (Pursuant to a statutory mandate, the Coast Guard made post-accident alcohol testing mandatory in an amendment to an existing rule permitting that testing. The FRA had previously included alcohol in its post-accident testing mandate and had authorized alcohol testing for reasonable cause.) In announcing the drug testing rules, then Secretary of Transportation James Burnley stated that he had directed his General Counsel to review the Department's existing alcohol regulations to determine if they were sufficient.

In his June 15, 1989, testimony before the Senate Committee on Commerce, Science and Transportation, former Secretary Samuel Skinner committed the Department to further exploration of the need for additional regulation of alcohol use. "Drug and Alcohol Testing: Hearings on S. 561. Before the Committee on Commerce, Science, and Transportation", 101st Cong., 1st Sess. 23–39 (1989). On November 2, 1989, the Department published an advance notice of proposed rulemaking (ANPRM) to solicit public comment on whether the Department's existing regulatory requirements and programs were sufficient to respond to the hazards of alcohol use and misuse in DOT-regulated transportation industries and to determine what additional action, if any, should be taken. The ANPRM is discussed in greater detail below.

The Public Hearing

To enable better evaluation and comparison of the capabilities of different alcohol testing methods, the Department of Transportation conducted a public hearing on November 18, 1991, to obtain specific information from the manufacturers of breath test devices. Our purpose was to examine the current or feasible capabilities of equipment to handle the problems of testing in the transportation industry, particularly verification of the identity of tested individuals and the validity of the test result. At the hearing, the Department noted that attempts to tamper with the test and refusals to acknowledge the test result may be problems since an immediate result is available. Even with procedural safeguards, we are concerned about the integrity of a breath test in various situations, for example:

1. *Tampering:* An employer may want to ignore a positive result to keep its business operating to the detriment of public safety. Alternatively, an employer may insist that a result is positive in order to get rid of a troublesome employee. In either case, the tester could substitute someone with or without alcohol in his/her system for the covered employee who was to be tested. The Department would need to be able to verify that the employer is complying with regulatory requirements and to protect the employee.

2. *Identification of Tested Employee:* A covered employee faced with an immediate positive result and the possible loss of his/her job may insist that he/she never blew into a breath test device; *e.g.*, that he or she completed the form and then the employer/tester blew into the device. The Department would need to be able to verify that the employee was the one tested.

The Department also indicated that it would need to ensure accurate test results without adding prohibitive costs to any proposed program. Representatives of eight manufacturers assured DOT officials that existing technology can keep adequate, verifiable records of tests. They claimed that they could make the following safeguards against tampering with only minor adjustments to hardware and software: storage of results in secure computer systems, assignment of a serial number to each test, and use of magnetic cards to identify testees. Voice identification of the testee is another possible technology, but it is still being developed. DOT's query about whether a camera could be added to the breath test device elicited industry warnings that more complicated equipment would be less portable and more prone to breakdown. The manufacturers pointed out that currently available equipment alone cannot provide an indisputable verification procedure or replace trained human supervision of the testing process.

The Department believes that the testing procedures set forth in the separate document proposing new alcohol provisions for 49 CFR part 40 published in today's **Federal Register** provide adequate safeguards for breath testing in response to the above concerns, but specifically seeks comment on this issue.

The ANPRM

In its November 2, 1989, ANPRM, the Department set forth a number of options for reducing alcohol misuse in DOT-regulated transportation industries, if further action were deemed necessary. The options included:

1. Requiring employers to establish Employee Assistance Programs (EAP) that provide education on the dangers of alcohol misuse as well as training to detect alcohol use or impairment on the job;

2. Requiring employers to set up self- and peer-referral programs designed to identify alcohol abusers and get them into rehabilitation programs, with the understanding that the identified abusers could retain their jobs if rehabilitation is successfully completed;

3. Requiring alcohol testing of transportation employees similar in whole or in part to our drug testing rules (e.g., pre-employment, periodic, reasonable cause, post-accident and random testing);

4. Requiring pre-performance testing prior to permitting a covered employee to operate a vehicle or perform safety- or security-related duties (e.g., a pilot

could be tested before entering the cockpit to fly an airplane); and/or

5. Encouraging the states to implement safety programs directed at alcohol misuse and to increase their enforcement efforts.

Comments on the ANPRM

General Summary

Over 225 comments were filed in response to the ANPRM. Commenters included governmental agencies, trade associations, academic and medical institutions and associations, companies, unions and individuals. About one-half of all commenters favored no additional federal regulation. About one-third of the commenters favored some combination of testing, education, rehabilitation, and enforcement. Twelve commenters, who directed their comments to all of the OAs, favored a combination of rehabilitation and education. Twenty-eight commenters, all of whom directed their comments to the FAA, favored a combination of education and enforcement; and 39 commenters who directed their comments to various OAs favored a combination of testing, rehabilitation, and enforcement. About one-sixth of all commenters favored testing as their preferred approach.

Grounds

About 75 percent of the commenters who addressed the question of what are the most appropriate grounds for testing favored reasonable cause and post-accident testing. These commenters argued that testing should occur only where there is cause to test, such as where a covered employee is suspected of being intoxicated, or where an accident may be causally linked to alcohol consumption. A number of these commenters also suggested that there should be increased enforcement of the existing regulations.

About 40 percent of commenters who addressed the issue favored different combinations of grounds for testing. In addition to reasonable cause and post-accident testing, preferred by all of these commenters, they also favored various combinations of pre-employment, periodic, random, pre-performance and post-rehabilitation testing. Commenters who favored such combinations, usually failed to provide specific reasons to support their favored combination. Those supporting random testing, however, focused on the unpredictable occurrences of this type of testing and the resulting deterrent effect.

Testing Techniques

About one-third of the commenters who focused on this issue suggested that employers be allowed to choose the testing techniques appropriate for their businesses and financial positions. Another third of the commenters favored breath testing. These commenters noted that breath test devices are portable and inexpensive. In addition, these devices provide the least invasive of all the testing techniques, because they do not rely upon the provision of any bodily fluid.

The remaining comments were equally divided in support of blood and urine testing. Those favoring blood believed that, although it is the most invasive, it is the only legally defensible testing technique for intoxication. Those favoring urine testing, on the other hand, focused on the ease of administration, particularly if combined with the current DOT-required drug testing program. Two commenters favored a two-tiered testing method, in which a breath test device is used as a screening device with a follow-up blood test, if the screen test was positive. These two commenters focused on avoiding the intrusiveness of a blood test without a showing of cause.

Finally, one manufacturer supported the saliva-based method it currently markets. This commenter claimed that its alcohol testing method is accurate, quick (the test may be performed within two minutes), does not need calibration, and does not require technical training to operate. In addition, the colored litmus paper upon which the testing method is based is relatively inexpensive when compared with other testing techniques requiring sophisticated equipment.

Alcohol Concentration

Commenters who addressed the issue of the appropriate concentration for a "positive" alcohol test favored concentrations ranging from zero to 0.05 alcohol concentration as the standard for prohibition. About half of these commenters favored 0.04 because, currently, most federal and state regulations mandate 0.04 as the prohibited alcohol concentration for commercial transportation operators. Twenty percent of these commenters favored an alcohol concentration of zero. They noted that alcohol's effects vary among individuals and that only zero tolerance would ensure zero alcohol impairment.

The remaining comments were divided equally among three different groups. The first group recommended implementation of different alcohol concentrations according to the type of testing that is employed. For example, the College of American Pathologists favored an alcohol concentration of 0.04 for blood testing, and 0.06 for breath testing. These commenters stated that different testing techniques are not equally accurate and that different alcohol concentrations should be chosen to account for the different chances of error associated with each testing technique.

The second group favored 0.02 as the prohibited alcohol concentration. Those commenters noted that although DOT should strive for "zero tolerance" of alcohol use while an individual is on duty, they believed 0.02 is the minimum alcohol concentration that can be reliably measured. Finally, the third group favored .05, believing that current technology is unable to accurately detect an alcohol concentration below that.

Consequences of a Positive Test

Commenters who addressed this issue favored one of four general approaches. Half argued that employers should be able to take whatever action they deem appropriate. Several were concerned by the prospect of a federal regulation that would dictate the manner in which they should deal with a covered employee who might place their business at risk because of an alcohol problem. Twenty percent favored mandatory rehabilitation. These commenters noted that alcoholism is a disease that requires treatment and stated that the employer has a duty to provide treatment before deciding to terminate a covered employee. Twenty percent favored federal regulations that would allow the employer to fire a covered employee for alcohol misuse if the problem is discovered through testing, but favored rehabilitation for a covered employee who comes forth voluntarily for treatment. They argued that this approach serves the dual goals of providing treatment to those who both want and need treatment, while allowing an employer to terminate those who pose too great a risk to the employer's business. About ten percent of the commenters favored automatic termination for any transportation employee with an alcohol misuse problem on the ground that such an employee poses too great a risk to the safety of passengers and the public at large.

Several of the matters at issue in the ANPRM are no longer issues, since the Act or other legislation mandates certain action. For example, the Act requires pre-employment, reasonable suspicion, random and post-accident testing for aviation, motor carriers, rail, and mass transit. Specific responses to the issues raised by the commenters as well as the specific statutory mandates,

authorizations, and prohibitions are discussed in more detail in this preamble and the preambles of the OA NPRMs.

The NPRM

General Information and Definitions

Throughout this document, we have generally relied on or referred to the results of many studies concerning alcohol. Parenthetical references to these studies are included in the text; their full names are listed alphabetically in a bibliography in appendix A. Copies of these studies have been placed in the OST rulemaking docket. It is important to note that the test data we have are not complete; often the database includes only those tests that were performed. Tests are performed after some accidents, but not others, depending upon current regulatory requirements, the availability of testing personnel, and location and timing of accidents. Also, data are not comparable among the transportation modes, because of differences in reporting requirements, databases, and time periods. In addition, the referenced studies generally used different parameters and are therefore not comparable to each other.

Many of the words relating to alcohol are used interchangeably in our society, which may cause some confusion. In this document, we use the terms "driving while intoxicated" (DWI) and "driving under the influence" (DUI) to refer to the same thing: violation of state and/or Federal alcohol concentration standards defining intoxication. "Zero tolerance" refers to a 0.00 alcohol concentration standard. "Impairment" and "under the influence" refer to the effect of alcohol ingestion in the performance of a safety-sensitive function, without regard to a specific alcohol concentration.

Existing Safety Problem

Effects of Alcohol

The potential effects of alcohol misuse are substantial in terms of lives lost, injuries and environmental and property damage. Alcohol misuse claims at least 100,000 lives annually, 25 times as many as all illegal drugs combined. In 1991, 41,462 deaths occurred on our nation's highways, of which 38.5 percent involved an intoxicated (with an alcohol concentration over 0.10) driver or non-occupant (e.g., pedestrian), and another 9.5 percent where at least some alcohol was involved. (National Highway Traffic Safety Administration, "1991 Alcohol Fatal Crash Facts.")

Ethanol (the psychoactive component of alcoholic beverages) is a central nervous system depressant. It has been widely recognized for years that consumption of alcohol can degrade performance of demanding or delicate tasks. There is less agreement, however, about how much alcohol must be ingested before there is a significant degradation of performance. Studies have indicated that the effects of alcohol vary among individuals, and, even for a given individual, alcohol will have varying effects depending on such factors as motivation, fatigue, and previous experience with alcohol (Zero Alcohol, 1987; Ryder, 1981; Landauer, 1983; Lister, 1983). One reason for the substantial variation among individuals is that ingestion of a specified quantity of alcohol by two people will not necessarily produce the same alcohol concentration in each, even if they have the same body weight (Zero Alcohol, 1987).

In one study, for example, it was found that a given body-weight-adjusted dose of ethanol could produce a range of alcohol concentrations of .036 to .095 (O'Neill, 1983). In addition, alcohol appears to enter the blood stream at different rates in different people (Zero Alcohol, 1987). In another study, subjects were given controlled doses and had equal amounts of food in their system. Nevertheless, the time required to reach the peak alcohol concentration varied from 15 to 90 minutes after ingestion (Wilson, 1984).

There also are performance differences between individuals that are unrelated to the blood alcohol concentration. It appears that highly skilled professionals may be better able to compensate for the physiological effects of alcohol than persons who are less skilled, particularly at lower alcohol concentrations. In two studies comparing the effect of alcohol on the performance of racing drivers and ordinary drivers on a closed track, the skill of the ordinary drivers showed some degradation at an alcohol concentration of 0.05, while the racing drivers showed no impairment until they reached substantially higher alcohol concentrations (Forney, 1961). Similarly, in a comparison of nonprofessional and professional pilots at alcohol concentrations of 0.04, 0.08, and 0.12, the nonprofessionals made numerous errors in tracking, while the professionals' tracking ability did not decrease even at the highest alcohol concentration (Billings, 1972). The study noted, however, that the professional pilots committed more procedural errors than normal after alcohol consumption. Compounding factors, such as fatigue and unexpected challenges, are likely to affect results in a real-world situation.

Most States have adopted an alcohol concentration of 0.10 as the definition of intoxication in connection with laws on driving under the influence for non-commercial as well as for commercial operators. Some use it as a rebuttable presumption of a violation; others as a *per se* violation. Five states have lowered their alcohol concentration standards to 0.08; and a number of states are in the process of considering adoption of the 0.04 FHWA alcohol concentration standard for commercial drivers. States with alcohol concentration standards for operating recreational vessels or aircraft typically use 0.10.

As indicated above, however, a number of laboratory studies have shown that performance on some tasks can begin to degrade at alcohol concentrations well under 0.10 (Moskowitz, 1973; Drew, 1959; Landauer, 1983). Some studies have suggested that performance degrades in a linear fashion, beginning with the lowest levels tested (Moskowitz, 1985; Drew, 1959). Blood alcohol concentrations (BAC) lower than 0.05 have been associated with increases in errors in tasks requiring divided attention, and it appears that cognitive performance is decreased for most individuals at BAC's of 0.04 or less (Zero Alcohol, 1987; Evans, 1974). Low alcohol concentrations have also been shown to affect a driver's stopping distance and to increase errors in steering (Laurell, 1977). There is no definitive answer to how much the risk of accident occurrence increases as a result of the performance deficit, but some relationship can be assumed. Those OAs in the Department that have set allowable alcohol concentrations for transportation workers (FAA, FHWA, FRA and Coast Guard) generally have used 0.04 as the prohibited concentration.

The Alcohol Problem—Generally

The National Institute on Alcohol Abuse and Alcoholism (NIAAA) reported in 1987 that two of every three adults in the United States drink, but 10 percent of those drinkers consume half of the nation's beer, wine and liquor. The National Institute on Drug Abuse (NIDA) reported that an estimated 17 million U.S. adults are alcoholics, which is about six times higher than the number of cocaine users. (NIDA study, 1989). While it is difficult to estimate the precise cost to society from alcohol misuse, there is no doubt that the cost is enormous. The potential effects of alcohol misuse are substantial in terms

of lives lost, personal injuries, property damage, business losses (lost productivity, absenteeism, increased health care costs, etc.) and environmental damage.

According to a Research Triangle Institute study performed for the Department of Health and Human Services, the overall economic cost to American society from alcohol misuse was $89.5 billion in 1980. This amount represents direct costs, such as medical treatment, and indirect costs, such as lost wages and reduced productivity. In 1987, the NIAAA estimated the economic costs to society of alcohol misuse to be nearly $117 billion a year, including $18 billion from premature deaths, $66 billion in lost productivity, and $13 billion for rehabilitation. Assuming the base numbers are still the same, inflation presumably has increased the cost in current dollars.

Alcohol Misuse in the Transportation Industry

General

Generally, the Department's previous alcohol misuse prevention efforts have focused on alcohol as it affects an individual's medical qualifications; prohibitions against on-duty use, operating while under the influence, and, in certain cases, use during defined pre-duty periods; and sanctions for violations of the Federal regulatory scheme, as well as sanctions for violations of State alcohol laws. Thus alcohol testing, with limited exceptions, has been left to State enforcement. (Current FRA rules require post-accident and authorize reasonable cause testing. The FAA requires crewmembers to submit to State tests upon request and to furnish the results to the Administrator. The Coast Guard also has existing requirements concerning alcohol misuse, including some testing.) Each of the following sections briefly describes the existing OA rules on alcohol and contains Departmental data on the alcohol problem in each segment of the transportation industry. We specifically invite commenters to provide to the appropriate OA docket any additional relevant data about the alcohol problem in the different modes of transportation.

Aviation

The current FAA regulations prohibit a person from acting or attempting to act as an aircraft crewmember if he or she is under the influence of alcohol, has consumed any alcoholic beverage within the prior 8 hours, or has an alcohol concentration of 0.04 or greater. The FAA may medically disqualify a pilot with a history of drug dependence, alcoholism, or mental problems. Since having a valid medical certificate is an essential job qualification for a pilot, a pilot lacking such a certificate is not a "qualified individual with a disability," and the Americans with Disabilities Act of 1990 (ADA) does not require an aviation employer to provide "reasonable accommodation" to such an individual.

In 1987, the Department's Inspector General checked the National Driver Register (NDR) against records in the Florida Department of Motor Vehicles; it found that nearly 8,000 FAA-certified pilots in Florida had been convicted of drunk-driving offenses. Recent legislation allowed FAA and the rail industry to use the NDR to locate and review individual driving records to screen qualifications of airline pilots and locomotive engineers. The FAA was unaware of these DUI convictions because the pilots had not reported them to the FAA as required. The FAA then issued a DUI enforcement policy and a rule that includes, among other matters, a process for examining driving records. Pilots with 2 or more drug- or alcohol-related driving offenses within 3 years are subject to FAA certificate revocation action.

There has never been an accident involving a large U.S. passenger airline in which the probable cause was attributed to alcohol use. However, in August 1990, three Northwest Airlines pilots were sentenced for flying while intoxicated between Fargo, ND, and Minneapolis, MN. Two hours after the flight ended, the crew captain's alcohol concentration was found to be 0.13; he testified that he drank 20 rum and cokes the night before the 6:00 AM flight. Starting in the early 1970's, the Air Line Pilots Association and the major airlines, in cooperation with the FAA, developed a program to identify alcoholic pilots, so that they could be treated and, as appropriate, returned to duty. More than 1,500 pilots have been through this program, with a relapse rate of approximately 10 percent. Since the program provides for stringent surveillance of treated pilots, there has been no compromise of safety. Nevertheless, the existence of such an extensive program and the occurrence of the Northwest pilots incident demonstrate that the air carrier industry is not immune to the problem of alcohol misuse. We do not have any data, however, on the costs of alcohol misuse in terms of lost productivity and increased medical expenses.

The National Transportation Safety Board (NTSB) has collected the following data concerning the relationship between alcohol and aviation accidents. From 1975 through 1986, eleven part 135 carriers (all except one were commercial air taxi cargo planes; the exception was a non-scheduled charter carrier with a foreign crew) were involved in accidents in which alcohol was determined to be a factor. As noted above, there have been no part 121 or part 135 (large or air taxi/commuter air carrier) accidents in which alcohol has been determined to be a cause.

Motor Carriers

Currently, drivers found to be under the influence of alcohol or drugs are disqualified from operating a commercial motor vehicle (CMV), or any vehicle subject to the Federal Motor Carrier Safety Regulations (FMCSRs). FHWA regulations prohibit the use of alcoholic beverages within four hours of reporting to work and also prohibit a driver from working while having any measurable alcohol concentration or any detected presence of alcohol in his or her system. This effectively amounts to a zero alcohol limitation for CMV operators. In addition, a driver will not be considered physically qualified to drive a motor vehicle if, among other things, the driver is an active alcoholic. On October 4, 1988, FHWA issued requirements that, by October 1, 1993, states must adopt regulations whereby a commercial motor vehicle (CMV) operator convicted of having an alcohol concentration of 0.04 or above will be deemed to be DUI and subject to a disqualification of at least one year, or the states will lose a percentage of federal-aid highway funds. These alcohol concentration regulations are integral to the commercial driver's license (CDL) program, a nationwide restructuring (under FHWA and state auspices) of testing, licensing, and disqualification procedures for CMV operators. Mandated by the Commercial Motor Vehicle Safety Act of 1986, the CDL program includes a national clearinghouse through which states exchange commercial drivers' record information, including the alcohol concentrations of convicted drivers.

Accident statistics indicate that nearly half of the fatally injured noncommercial motor vehicle drivers had a measurable amount of alcohol in their blood (usually 0.10 or more) compared with about 15 percent of fatally injured drivers of medium and heavy trucks. Moreover, as the chart below indicates, for those truck drivers who had been drinking before an accident, the highest accident rate was among those consuming the most alcohol. Drivers of heavy and medium

trucks with measurable alcohol concentrations are involved in about 750 fatal crashes annually, along with another 7,700 crashes resulting in personal injuries and 4,750 crashes involving only property damage (Zero Alcohol, 1987).

	Percentage of all fatal truck accidents	Percent of the 15% of truck drivers who had alcohol in their blood
No Truck Driver Use of Alcohol	85.0	N/A
AC = 0.10 or more	9.1	60
AC = 0.04-0.10	2.7	18
AC = .03 or less	3.2	21

(Zero Alcohol, 1987) (FARS data tapes, 1982–1985) (AC means alcohol concentration).

In 1990, the NTSB published the results of a study of alcohol (and other drugs) used by CMV operators in fatal-to-the-driver, heavy truck accidents. Thirteen percent of the fatally injured drivers tested positive for alcohol. (Another 20 percent of the drivers tested positive for other drugs.) We also know that the cost of accidents to employers is substantial, over and above the lives lost, whether CMV accidents are caused by alcohol or something else. The National Safety Council estimates that an on-the-job accident is four times more costly than one that occurs in a personal vehicle, with an average cost to employers of $168,000 for a fatal accident and $6,900 for a non-fatal accident. The impact of on-the-job accidents caused by alcohol on employer costs is quite significant.

Rail

Current FRA regulations (49 CFR part 219) prohibit on-the-job use of, possession of, or impairment by, alcohol or any controlled substance, or having an alcohol concentration of 0.04 or more, for employees covered by the Hours of Service Act. FRA further prohibits any employee who performs service under the Hours of Service Act from using a controlled substance at any time, whether on duty or off-duty, except as authorized, and at the prescribed dosage, by a medical practitioner who is aware of the employee's duties. If a railroad determines that there is reason to believe that a covered employee has used a controlled substance, as evidenced by the results of certain tests, the railroad must immediately remove the employee from covered service.

Operation RedBlock is a peer prevention substance abuse program. Workers who use controlled substances or who report for duty under the influence can be identified, removed from the workplace, and referred for assistance. The covered employee can be referred for assistance by a peer, a supervisor or himself/herself. From February 1986, when mandatory FRA post-accident blood testing for alcohol began, through December 1991, 22 employees tested positive for alcohol (0.6 percent of employees tested). However, the number of positive findings has declined dramatically from 6 (1.0 percent of all persons tested) in 1989, to 1 (0.2 percent of all persons tested) in 1990. In 1991, 2 alcohol positives were recorded (0.4 percent of all tested.)

Since 1986, however, alcohol appears to have played a causal role in 10 accidents/incidents involving four deaths, three injuries, and property damage in excess of $3.2 million. In one, the engineer tested positive at an alcohol concentration of 0.16, and alcohol was found by the NTSB to be a contributing factor to the accident. The incident caused $1.58 million damage and the death of the engineer. In another accident, eight injuries and $194,000 in damages resulted, and a dispatcher tested positive at 0.15 alcohol concentration. In a 1990 accident, an engineer tested positive with an alcohol concentration of 0.05 after his train passed a stop signal and collided with another train, resulting in one injury and nearly $500,000 in property damage. In 1991, two brakemen were killed, one by a train when struck during a switching operation and the other when he fell from the side of a train. Post-mortem toxicology revealed alcohol concentrations of 0.04 and 0.08, respectively.

Reasonable cause breath testing under the FRA program or pursuant to railroad authority (triggered by rule violations, less serious accidents and injuries, or reasonable suspicion) has produced the following results: 11 of 348 persons so identified tested positive in 1986 (3.2 percent); 24 of 593 tested positive in 1987 (4.0 percent) 46 of 1005 tested positive in 1988 (4.6 percent); 31 of 973 tested positive in 1989 (3.2 percent); 32 of 2662 tested positive in 1990 (1.2 percent) and 37 of 2798 tested positive in 1991 (1.3 percent). FRA regulations define a "positive" breath test as one indicating an alcohol concentration of 0.02 or above. The significance of these results with respect to measuring prevalence in the population is difficult to determine, since some of the tests were performed because of reasonable suspicion of recent use. It should be expected that a high percentage of reasonable suspicion tests will be positive, since prohibited use or impairment had already been identified or suspected.

Mass Transit

FTA does not have any existing regulations concerning alcohol. Its primary mission is to provide grants for the financing and improvement of mass transportation systems. Many of FTA's grantees, however, are subject to other Federal requirements on alcohol use. All commuter rail operations funded by FTA, for example, are subject to FRA regulations.

The need for alcohol testing of mass transit employees recently was highlighted by a December 28, 1990, accident in Boston, Massachusetts, where a mass transit operator, with an alcohol concentration above 0.10, crashed a trolley car, injuring 33 people. In addition, the Senate Committee on Commerce, Science, and Transportation's report on S. 676, No. 102–54, (May 2, 1991), noted that in Philadelphia alone, transit operators have tested positive for drug or alcohol use in six major accidents between 1986 and 1990, involving at least 183 injuries and three deaths. (Separate figures for drug and alcohol involvement were not provided.) On August 28, 1991, a motorman later found to have an alcohol concentration of 0.21 crashed a subway train resulting in 5 deaths and 171 injuries; this accident broke the Congressional impasse on alcohol/drug testing legislation and led to the prompt passage of the Act. Following issuance of the 1988 FTA anti-drug rulemaking, some industry members indicated that alcohol is a more serious problem than drugs. One transit-specific survey indicates that between 1982 and 1985, only five out of 1,210 bus drivers tested positive for alcohol following a fatal accident. However, information originating from industry sources indicates that transit bus drivers are heavier drinkers than the general population (U.S. Census Bureau, 1984). One survey found that 57 percent of bus drivers drink alcohol at least weekly, with an average consumption of nine alcoholic drinks per week; the national median is six drinks per week (U.S. Census Bureau, 1984).

An FTA document entitled, "Substance Abuse in the Transit Industry," November 1991 (prepared under the UMTA nomenclature), was based upon a transit agency survey and an employee survey. Responding transit managers perceived alcohol as the major substance of misuse. Fifty-eight percent of the transit systems test for alcohol. Employee knowledge of coworker use of alcohol was extensive; about 70 percent

of employees surveyed had some knowledge, either through hearsay or by direct observation, of alcohol impairment of colleagues in the workplace during the past year. About six percent of the safety-sensitive employees reported alcohol use during or just before duty. Another 15 percent of the safety-sensitive employees reported less frequent alcohol consumption, but at nearly similar volume as those employees noted above. When comparing these data with those contained in the "National Household Survey on Drug Abuse: Population Estimates 1988" and the comparable 1990 NIDA survey, it appears that reported alcohol use in the transit industry is slightly lower than that reported for the general population.

Pipeline

RSPA has no specific regulations on alcohol. It does have a general regulation on health of pipeline workers at liquefied natural gas plants. Pipeline operators must look for any physical condition that would impair performance, including any observable disorder or condition that is discoverable by a professional examination.

We have no specific data on alcohol-related accidents or lost productivity data in this area; however, a number of the commenters in the anti-drug rulemaking seemed to believe that alcohol is a more pervasive problem than drugs in the pipeline industry. We also are aware that many companies in the pipeline industry are known to have alcohol prevention programs, but we do not have statistics or data on the prevalence of the problem in the industry. Although we recognize that the largest single cause of pipeline accidents is excavation damage by people digging into pipelines (people not regulated by RSPA), we specifically request public comment and data on alcohol misuse and its relationship to safety problems in the pipeline industry.

Legal Authority/Issues

General

The Omnibus Transportation Employee Testing Act of 1991 is a direct statutory mandate for the proposed alcohol testing in the aviation, motor carrier, rail, and mass transit industries. In addition to this authority, the general safety authority relied on for issuing the drug testing rules described above also provides a basis for issuing alcohol misuse prevention rules by FAA, FHWA, FRA, and RSPA. Although the existing case law addressing the constitutionality of employee alcohol testing programs remains more sparse than that for drug testing, the Department believes that existing legal precedents support this rulemaking effort to require alcohol testing in the regulated transportation industries.

Consistent with court findings in the area of government-mandated drug testing of employees, alcohol testing mandated by the government is considered a search within the meaning of the Fourth Amendment to the U.S. Constitution. See, *Schmerber* v. *California*, 384 U.S. 757, 767–768 (1966)("compelled intrusions into the body for blood to be analyzed for alcohol content" must be considered a Fourth Amendment search); *Skinner* v. *Railway Labor Executives' Association*, 489 U.S. 616–617 (1989) ("Subjecting a person to a breathalyzer test, which generally requires the production of alveolar or 'deep lung' breath for chemical analysis * * * implicates * * * concerns about bodily integrity and, like the blood-alcohol test * * * considered in *Schmerber*, should also be deemed a search.")

In deciding whether a particular search comports with Fourth Amendment protections, courts must determine that under all the particular circumstances the search itself is "reasonable." As the leading case on bodily fluid testing, *Skinner* v. *Railway Labor Executives' Association*, makes clear, issuance of a warrant or the existence of probable cause or individualized suspicion is not a minimum essential requirement in establishing the reasonableness of a search under an administrative testing program.

In *Skinner (id.)*, the Supreme Court upheld regulations issued by the Federal Railroad Administration governing drug and alcohol post-accident and reasonable cause testing of railroad employees (49 CFR part 219). The Court concluded that the testing procedures and methods of procuring blood, breath, or urine for testing as set forth in subparts C and D of the FRA regulations "pose only limited threats to the justifiable expectations of privacy of covered employees." 489 U.S. 628. In specifically focusing on the privacy implications of breath alcohol tests, the Court also pointed out that:

> The breath tests authorized by subpart D of the regulations (testing for reasonable cause) are even less intrusive than the blood tests prescribed by subpart C (post-accident toxicological testing). Unlike blood tests, breath tests do not require piercing the skin and may be conducted safely outside a hospital environment and with a minimum of inconvenience or embarrassment. Further, breath tests reveal the level of alcohol in an employee's bloodstream and nothing more. Like the blood-testing procedures mandated by subpart C, which can be used only to ascertain the presence of alcohol or controlled substances in the bloodstream, breath tests reveal no other facts in which the employee has a substantial privacy interest. * * * In all the circumstances, we cannot conclude that the administration of a breath test implicates significant privacy concerns. *Id.*, at 625–626.

While the Court indicated that the collection of urine samples requires employees "to perform an excretory function traditionally shielded by great privacy, [thus] rais[ing] concerns not implicated by blood or breath tests[,]" it pointed out that the FRA collection procedures significantly reduced the degree of personal privacy intrusion. *Id.*, at 626. The Court also examined the overall privacy expectations of covered railroad workers subject to the FRA testing requirements. It concluded that these expectations "are diminished by reason of [covered employees'] participation in an industry that is regulated pervasively to ensure safety * * * *Id.*, at 627.

By contrast, the Court found that the government's interests in seeking to determine the cause of an accident or incident, deterring alcohol and illegal drug use by rail employees, and safeguarding the general public are compelling. Under these circumstances, the Court held that alcohol and drug testing pursuant to the FRA regulations are reasonable within the meaning of the Fourth Amendment. Also, the Court found that the government's justification in testing for misuse of alcohol—a legal substance—was entitled to no less weight than its justification for testing for drugs, the possession of which is unlawful. Thus, as the Court pointed out, the FRA-prescribed toxicological tests were not designed "to assist in the prosecution of employees, but rather 'to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs.'" *Id.*, at 621–622, 633 (quoting FRA regulations at 49 CFR 219.1(a)).

The proposed alcohol testing requirements for transportation industry workers published by each of the OAs in today's Federal Register are consistent with the Court's views in *Skinner*. Given the overwhelming public safety considerations associated with alcohol testing programs and the limited degree of intrusion into individual privacy interests engendered by the tests, testing programs along the lines proposed would be constitutionally permissible under the Fourth Amendment.

Also, the proposed requirement that an employer perform random alcohol testing that is performance-related, *i.e.*, related closely in time to an employee's actual performance of safety-related duties, further demonstrates the reasonableness of the proposal for Fourth Amendment purposes by ensuring that testing for misuse of alcohol is clearly related to the employee's performance of these duties. However, it is important to point out that performance-related testing is not an irreducible minimum requirement for ensuring that such testing passes Fourth Amendment muster. As a number of courts have pointed out, the reasonableness of a testing program does not necessarily turn on the existence of other alternatives that might be less intrusive. See *American Federation of Government Employees* v. *Skinner*, 885 F.2d 884, 897 (1989), *cert. denied*, 495 U.S. 923–924 (1990).

The lack of a demonstrated substance abuse problem among the workforce in a particular industry should not, of itself, pose insurmountable constitutional impediments to a testing program for that workforce. This point was made clear by the Supreme Court in *National Treasury Employees Union* v. *Von Raab*, 489 U.S.674–675 (1989), which was decided the same day as *Skinner*. In *Von Raab*, the Court upheld urinalysis testing for illegal drugs of U.S. Customs Service employees slated for promotions into positions that involved either interdicting illegal drugs or carrying a firearm. Despite the Commissioner of Customs stated belief that "Customs is largely drug-free," the Court concluded that there was little reason to suspect that the Customs Service was "immune" from society's pervasive drug abuse problem and held that the testing program was constitutionally defensible as a means to ensure that employees promoted to these sensitive positions are drug-free. *Id.*, at 660, 674. It stated that the government does not have to first establish that a specific industry has a problem. ("It is sufficient that the government have a compelling interest in preventing an otherwise pervasive societal problem from spreading through the particular context.") *Id.*, footnote 3.

Skinner and *Von Raab* established the analytical framework for courts to resolve constitutional challenges to various employee substance abuse testing programs. Not surprisingly, Federal courts reviewing anti-drug abuse regulations issued by the Department have relied extensively on these two decisions in upholding drug testing of safety- and security-sensitive workers in industries regulated by the Department. See, *Bluestein* v. *Skinner*, 908 F.2d 451 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 954 (1991) (upholding constitutionality of Federal Aviation Administration regulations requiring random drug testing of flightcrew members, maintenance personnel, and other categories of employees in the commercial aviation industry); *International Brotherhood of Teamsters* v. *Department of Transportation*, 932 F.2d 1292 (9th Cir. 1991) (upholding constitutionality of Federal Highway Administration regulations requiring random, biennial, pre-employment and post-accident drug testing of commercial motor vehicle drivers operating in interstate commerce); *Railway Labor Executives' Association* v. *Skinner*, 934 F.2d 1096 (9th Cir. 1991) (upholding constitutionality of Federal Railroad Administration's regulations requiring random drug testing of railroad workers in safety-sensitive positions); *International Brotherhood of Electrical Workers* v. *Skinner*, 913 F.2d 1454 (9th Cir. 1990), and *United Steelworkers of America* v. *Skinner*, 768 F. Supp 30 (D. RI 1991)(upholding constitutionality of Research and Special Programs Administration's regulations requiring random, pre-employment, and post-accident drug testing of safety-sensitive employees engaged in natural gas, liquefied natural gas, and hazardous liquid pipeline operations.) See also, *Transportation Institute* v. *Coast Guard*, 727 F. Supp. 648 (D.D.C. 1989) (upholding constitutionality of Coast Guard regulations requiring pre-employment, periodic, post-casualty, and reasonable cause drug testing for merchant marine personnel; however, regulations requiring random drug testing of all vessel crewmembers were found to violate the Fourth Amendment because the safety-sensitive duties performed by this entire class of employees was not evident. Although the court noted that random testing for employees could be constitutionally acceptable, it held that the Coast Guard had not adequately described the safety-sensitive functions of the covered employees to allow the court to establish the necessary nexus. The missing safety nexus was established in a subsequent Coast Guard final rule reimplementing random drug testing).

Even pre-*Skinner* and *Von Raab* court decisions addressing the constitutionality of various employee alcohol testing programs have concluded that such testing comports with the Fourth Amendment. Thus, a state regulation requiring jockeys to submit to mandatory warrantless breath alcohol tests on each racing day was found to be constitutionally permissible. *Shoemaker* v. *Handel*, 795 F.2d 1136 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986). Similarly, alcohol and drug testing during a pre-employment physical examination, work-related examination, return to work after unscheduled absence, or on the basis of reasonable suspicion or involvement in an accident or incident was upheld in the case of mass transit employees directly involved in the operation, maintenance, and decisionmaking of a public transit system. *Amalgamated Transit Union, Local 933* v. *City of Oklahoma City*, 710 F. Supp. 1321 (W.D. Okla. 1988). *Accord*, *Amalgamated Transit Union, Division 1279* v. *Cambria County Transit Authority*, 691 F. Supp. 898 (W.D. Pa. 1988)(mandatory drug and alcohol testing during annual physical examination does not violate Fourth Amendment).

Also, several more recent Federal court decisions upheld employee alcohol testing in the wake of *Skinner*. Thus, in *Transport Workers Union, Local 234* v. *Southeastern Pennsylvania Transportation Authority*, 863 F.2d 1110 (3d Cir. 1988), *vacated and remanded*, 492 U.S. 902 (1989), *aff'd on remand sub nom. United Transportation Union* v. *Southeastern Pennsylvania Transportation Authority*, 884 F.2d 1110 (1989), the U.S. Court of Appeals for the Third Circuit upheld, *inter alia*, random breath testing of mass transit operating employees. See also, *Tanks* v. *Greater Cleveland Regional Transit Authority*, 930 F.2d 475 (6th Cir. 1991) and *Holloman* v. *Greater Cleveland Regional Transit Authority*, 741 F. Supp. 677 (N.D. Ohio 1990), affirmed, 930 F.2d 918 (6th Cir. 1991) (upholding transit authority's drug and alcohol testing program requiring testing of blood, saliva, and urine in the face of challenges by two bus drivers subjected to random, post-accident, and periodic testing); *Moxley* v. *Regional Transit Services*, 722 F. Supp. 977, 980 (W.D. NY 1989) (upholding constitutionality of transit authority's drug and alcohol testing program and noting that "the Government's interest in the efficient and proper operation of the workplace is at a zenith where public's [sic] lives depend on the reliable and sober performance of Government employees").

Consistent with the Supreme Court's analysis in *Skinner* and *Von Raab* and lower court decisions, if the Congress determines that there is a need for properly-administered alcohol testing to ensure that employees in transportation

industries are not impaired while performing sensitive safety-related functions, that need would outweigh the privacy interests of these employees and, thus, would be constitutionally permissible.

The Americans With Disabilities Act of 1990

The Americans with Disabilities Act of 1990 (ADA) does not, in any way, preclude or interfere with employers' compliance with the Department's proposed or existing drug and alcohol testing regulations. However, Title I of the ADA, which prohibits discrimination against a "qualified individual with a disability," may affect the personnel actions an employer might wish to take with respect to some individuals who test positive for alcohol or drugs or otherwise violate the prohibitions of the Department's drug and alcohol rules.

Title I covers employers who have fifteen or more employees for more than 20 calendar weeks in a year (Section 101(5)(A)). Until July 26, 1994, only employers with 25 or more such employees are covered. Covered employers may not discriminate against a qualified individual with a disability with respect to applications, hiring, advancement, discharge, compensation, or other terms, conditions or privileges of employment (Section 102(a)).

Before discussing the effect Title I may have on employer personnel actions following a positive DOT-mandated drug or alcohol test or other violations of DOT drug and alcohol rules, it is important to note the specific ADA provisions that address DOT drug and alcohol rules. The ADA specifically authorizes employers to require that employees comply with the standards established in regulations of the Department of Transportation if the employees of the covered entity are employed in a transportation industry subject to such regulations, including complying with such regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Transportation). (Section 104(c)(5)(C)). By authorizing employers to require employees to comply with the standards in DOT rules, this provision authorizes compliance not only with testing provisions of the rules but also of other drug and alcohol-related provisions that affect safety-sensitive employees (e.g., pre-duty abstinence, on-the-job use). The legality under the ADA of employer compliance with DOT drug and alcohol requirements other than those concerning testing is underlined by several other provisions of Title I. An employer may prohibit the use of drugs and alcohol in the workplace, may require that employees not be under the influence of alcohol or be engaging in the illegal use of drugs in the workplace, and may require that employees conform to the requirements of the Drug-Free Workplace Act (section 104(c)(1–3)).

Concerning drug and alcohol testing and its consequences, the statute further provides that nothing in this title shall be construed to encourage, prohibit, restrict, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to (1) test employees of such entities in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs and for on-duty impairment by alcohol; and (2) remove such persons who test positive for illegal use of drugs and on duty-impairment by alcohol pursuant to paragraph (1) from safety-sensitive duties in implementing subsection (c). (Subsection (c) includes the statutory language cited above.) (Section 104(e)). These ADA provisions clearly specify that the ADA does not interfere with the compliance by covered employers with DOT regulations concerning drug and alcohol use, including requirements for testing and for removing persons who test positive from safety-sensitive functions. Under the ADA, an employer is not viewed as "discriminating" for following the mandates of DOT drug and alcohol rules.

In considering the effects on the personnel actions that employers choose to take after a safety-sensitive employee tests positive for drugs or alcohol or otherwise violates DOT drug or alcohol rules, it is important to note that the ADA's prohibition of employment discrimination applies only with respect to a "qualified individual with a disability." The ADA specifically provides that an employee or applicant who is currently engaging in the illegal use of drugs is not a "qualified individual with a disability" (section 104(a)). The ADA does not protect such an employee from adverse personnel actions. For purposes of the ADA, the drugs that trigger this provision are those they use, possession or distribution of which is prohibited by the Controlled Substances Act (section 101(6)). The five drugs for which DOT mandates tests fit this definition (alcohol is not a drug covered by the Controlled Substances Act).

What does "currently engaging" in the illegal use of drugs mean? According to the Equal Employment Opportunity Commission (EEOC), whose rules carry out Title I, the term "currently engaging" is not intended to be limited to the use of drugs on the day of, or within a matter of days or weeks of, the employment action in question. Rather, the provision is intended to apply to the illegal use of drugs that has occurred recently enough to indicate that the individual is actively engaged in such conduct. (56 FR 35745–46, July 26, 1991). It is clear that an individual who fails a DOT-mandated drug test is currently engaging in the illegal use of drugs. Therefore, under Title I, an employer may discharge or deny employment to an individual who fails a DOT-mandated drug test.

This provision that an individual who is currently engaging in the illegal use of drugs is not a "qualified individual with a disability" does not apply, of course, if the individual is erroneously regarded as engaging in the illegal use of drugs. In addition, if an individual, even a former user of illegal drugs, is not currently engaging in the illegal use of drugs and has successfully completed a supervised rehabilitation program or otherwise has been successfully rehabilitated, or is participating in a supervised rehabilitation program, the individual can continue to be regarded as a "qualified individual with a disability," if the individual is otherwise entitled to this status (section 104(b)). An employer may seek reasonable assurance that an individual is not currently engaging in the illegal use of drugs (including requiring a drug test) or is in or has completed rehabilitation. Some employers (EEOC uses the example of a law enforcement agency) may also be able to impose a job qualification standard that would exclude someone with a history of drug abuse if they can show that the standard is job-related and consistent with business necessity (56 FR 35746, July 26, 1991).

Unlike the situation with respect to the current use of illegal drugs, the use of alcohol contrary to law, Federal regulation, or employer policy does not deprive an individual of status as a "qualified individual with a disability" that he or she would otherwise have under Title I. An individual is protected by Title I, however, only if the individual has a disability in the first place. (This is also true with respect to a former drug user or any other individual who seeks the protection of the ADA.) To have a disability, an individual must have a "physical or mental impairment that substantially limits one or more major life activities of such individual, a record of such

impairment, or being regarded as having such an impairment" (section 1(2)). While, as the EEOC notes in its Title I regulation, "individuals disabled by alcoholism are accorded the same protections accorded other individuals with disabilities" (56 FR 35752, July 26, 1991), not all individuals who use alcohol in violation of law, Federal regulation, or employer policy are "disabled by alcoholism."

The courts interpreting section 504 of the Rehabilitation Act of 1973 (with which ADA employment provisions are intended to be consistent) have concluded that alcoholism can be a disability which may call for reasonable accommodation. See, e.g. *Walker* v. *Weinberger*, 600 F. Supp. 757 (D.D.C., 1985); *Tinch* v. *Walters*, 765 F.2d 599 (6th Cir., 1985); *McKelvey* v. *Walters*, 596 F. Supp.1317 (D.D.C., 1984); *Anderson* v. *University of Wisconsin*, 665 F. Supp. 1372 (W.D. Wis., 1987), aff'd 841 F.2d 737 (7th Cir., 1988); *Richardson* v. *Postal Service*, 613 F. Supp. 1213 (D.D.C., 1985); *Sullivan* v. *City of Pittsburgh*, 811 F.2d 171 (3rd Cir., 1987).

The logic of the ADA, and EEOC's regulatory provisions implementing the statute, suggest that, in determining whether an employee or applicant who fails a DOT-mandated alcohol test or otherwise violates a DOT alcohol rule is disabled by alcoholism, the employer would answer two questions. First, does the individual have a physical or mental impairment; *e.g.*, is the individual an alcoholic? (It seems clear that, in most cases, someone who is merely a recreational drinker would not have a physical or mental impairment related to alcohol use.) This question would probably have to be answered with the assistance of a physician or substance abuse professional. Second, if the individual is an alcoholic, does this impairment substantially limit a major life activity or is it regarded as substantially limiting a major life activity? This question would be answered on a case-by-case basis, following EEOC's guidance (see 56 FR 35740–44, July 26, 1991). It is likely that, under DOT's proposed alcohol rules, these determinations would be made by or in cooperation with the substance abuse professional that the proposed rules would require to be involved following a positive test or rule violation.

If the individual is determined to be disabled by alcoholism, then the employer may not discriminate against the individual on the basis of his or her disability and must make "reasonable accommodations" to the individual's known physical or mental limitations, unless the employer can demonstrate that doing so would impose an "undue hardship" on the employer's business.

The selection of an appropriate "reasonable accommodation" is done on a case-by-case basis, as EEOC guidance provides (See 56 FR 35744, July 26, 1991). Reasonable accommodation for an individual disabled by alcoholism could include such actions as referral to an Employee Assistance Program or other rehabilitation program, provision of rehabilitation services, and giving an employee sufficient time to demonstrate that rehabilitation had been successful. *See, e.g., Washington* v. *Department of the Navy*, 30 M.S.P.R. 323 (1986); *Swafford* v. *Tennessee Valley Authority*, 18 M.S.P.R. 481 (1983).

Even when an individual is disabled by alcoholism, however, the employer is not required to provide a reasonable accommodation that creates an "undue hardship." Undue hardship involves significant difficulty or expense in, or resulting from, providing an accommodation. EEOC describes an undue hardship as "an accommodation that would be unduly costly, extensive, substantial or disruptive, or that would fundamentally alter the nature or operation of the business." (*Id.*) This concept takes into account the financial resources of the employer (e.g., an accommodation that would be reasonable for a large business may be an undue hardship for a small business). But the concept is not limited to financial difficulty. For example, if a small trucking company with two drivers determined that the accommodation that one of them needed for an alcoholism-related disability was lengthy in-patient rehabilitation, the company not only might find the accommodation beyond its financial resources but also too disruptive of its operations (i.e., a temporary replacement would have to be hired or the work of the firm be halved).

Under title I, an employer may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance or behavior as it holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of the employee (Section 104(c)(4)). For example, if, as the result of alcoholism, an employee is chronically late or absent, or makes frequent job errors, the employee would be subject to personnel action on the same basis as any other employee who exhibited similar behavior for other reasons.

There are also situations in which meeting qualification standards of DOT safety rules, or having a valid license or certificate from a DOT operating administration, is an essential job qualification. If a truck driver does not meet FHWA qualification standards to obtain a Commercial Driver's License from a state, or if a pilot does not qualify for an FAA medical certificate, that individual is not a "qualified" individual with a disability, even if the reason for the failure to meet DOT qualifications is a condition that an employer might be required to accommodate under the ADA. The legislative history of the ADA specifically recognizes this special status for DOT qualification standards (See Senate Report 101–116 at 27, August 30, 1989).

Overview of the Operating Administrations' Proposed Rules

Purpose

Each of the OAs is proposing to establish alcohol testing programs designed to help prevent accidents and injuries resulting from the misuse of alcohol by employees who perform safety-sensitive functions in the industry under its purview. Generally, the rules would prohibit any alcohol misuse that could affect performance of a safety-related function, including (1) Use on the job, (2) Use during the four hours (in most cases) before performance of a safety-sensitive function, (3) Having prohibited concentrations of alcohol in the system while performing safety-sensitive functions, (4) Exhibiting behavior and/or appearance characteristic of alcohol misuse or an adverse effect on the employee's ability to perform due to alcohol misuse while performing safety-sensitive functions, and (5) Use following an accident. The rules would require pre-employment, reasonable suspicion (which is comparable to reasonable cause testing as used in the DOT OAs' drug rules and as discussed in the DOT ANPRM on alcohol testing), random, post-accident, return-to-duty and follow-up testing for alcohol using an evidential breath testing device; refusal to take a required test would be prohibited. The primary purpose of the testing provisions is to deter misuse of alcohol. For those who persist in their misuse of alcohol, these tests also would provide for detection.

The proposed part 40 procedural rule published elsewhere in this **Federal Register** provides for two tests to ensure accuracy: an initial and a confirmatory test. Following a determination that an employee has misused alcohol, as

determined through testing or other means, the rules generally would require the employees removal from safety-related functions and provide a bifurcated system of consequences:

(1) Following a determination that the employee has violated prohibitions in these rules, an employee must be removed from and could not be returned to a safety-sensitive function until, at a minimum,

(a) The employee undergoes evaluation, and where necessary, rehabilitation,

(b) A substance abuse professional determines that the employee has successfully complied with any required rehabilitation,

(c) The employee tests at less than 0.02, and

(d) The employer determines that the employee can resume safety-sensitive functions;

(2) An employee with an alcohol concentration of 0.02 or greater but less than 0.04 would not be permitted to perform safety-sensitive functions for

(a) A minimum of eight hours or

(b) Until a retest shows that the alcohol concentration has dropped below 0.02.

The proposed rules also would impose reporting and recordkeeping requirements and provide for alcohol misuse information for employees, supervisor training, and referral of employees to employee assistance programs (EAPs).

There are some differences among the OA NPRMs. For example, some OAs have regulatory authority over employers/companies only; others have regulatory authority over employees. Also, employees holding a license or certificate may be subject to customary agency action against their license or certificate in addition to the consequences proposed for violations of these rules. See the individual OA preambles for an explanation of any differences from the general requirements discussed above.

Applicability

The OA existing drug rules generally cover persons who perform sensitive safety- or security-related functions in commercial transportation. They affect approximately 4 million persons and include, for example, commercial truck drivers, pilots, pipeline employees, licensed and documented mariners and others serving on board a vessel with a licensed operator, and railroad workers subject to the Hours of Service Act. (An FTA proposed rule published in today's **Federal Register** would add drug testing for such workers as transit bus and subway operators.) If the proposed alcohol testing rules covered the same population, the inclusion of intrastate truck and motor coach operations (including those operated by Federal, State and local government agencies, church and civic organizations, farmers and for-hire companies) under the Act would increase total persons covered by the alcohol testing rules to about 7 million (this number excludes the maritime industry personnel covered by the drug rules, but not by the alcohol proposals, and is increasing as more people apply for Commercial Drivers Licenses).

In the ANPRM, we asked what, if any, rationale there is for covering a different population for alcohol testing than drug testing. It would appear that the same employees who could cause safety problems if they are on drugs could cause problems through misuse of alcohol. The basis for imposing any requirements concerning alcohol misuse should be the performance of safety-sensitive functions. Therefore, we are proposing to cover the same population under the proposed alcohol testing programs. Although the term "security" is used with respect to aviation passenger and baggage screeners, these persons really are performing a safety-related function-maintaining aircraft security, and, therefore, would be covered by the FAA NPRM.

The proposed OA rules focus on function rather than a defined job or position. An individual's job may encompass several different functions, some of which are not safety-sensitive. Since alcohol is a legal substance, alcohol use is relevant only to the extent it affects performance of a safety-related function. As a safety regulatory matter, for example, we are not concerned if an aircraft mechanic has a drink before or while performing functions that are not safety-related (as long as no other rule is violated); if the mechanic is receiving all-day training on retirement planning along with non-safety employees and the other employees can have a drink at lunch, the mechanic may also.

Alcohol Testing Procedures

Each of the OA NPRMs would require that employers ensure that all alcohol testing conducted under these rules complies with the procedures for alcohol testing contained in the proposed 49 CFR part 40 (the testing procedures NPRM) issued by DOT elsewhere in todays **Federal Register**. Each OA NPRM incorporates by reference the proposed 49 CFR part 40. Since the testing procedures are designed to apply to alcohol testing conducted by those OAs publishing NPRMs today, the DOT is issuing these procedures for incorporation into each OA NPRM in order to avoid unnecessary duplication.

In the ANPRM, we requested comment on which of the following test methods would be best for use in industry alcohol testing programs: (1) Preliminary or screening breath test devices, including tubes containing crystals that change color when exposed to alcohol and passive alcohol sensors; (2) Evidential breath test devices; (3) Blood; (4) Urine; (5) Saliva; and (6) Psycho-physical sobriety tests, such as the Walk and Turn, One-Leg Stand and Horizontal Gaze Nystagmus. Since that time, other testing devices for so-called "performance testing" and "fitness for duty testing" have become commercially available. As with saliva testing (see below), these devices generally are not recognized as evidential test devices (those that provide the necessary verification of an accurate result and the testee's identity upon which permanent employment consequences should rest). The Department intends in the future to seek comment on the scientific, technological, and legal status of these performance testing devices in a separate notice.

All of the preliminary breath test devices are useful as screening devices for determining the presence of alcohol and the need for further testing. As many commenters noted, they are inexpensive and easy to transport. While some are quite accurate at measuring an individuals alcohol concentration, others are not or their accuracy is too sensitive to environmental conditions. None of the preliminary breath devices currently provides the necessary verification of an accurate result upon which permanent employment consequences should rest. The National Highway Traffic Safety Administration (NHTSA) recently tested a saliva device, which represents a relatively new technology, but did not find it accurate enough to be considered an evidential alcohol testing device.

We agree with assertions by several commenters that blood testing is accurate and, conducted according to the proper procedures, provides evidential-quality results. However, it has several drawbacks. It is physically more invasive than other techniques and requires collection by qualified professionals at suitable locations. Blood test results would not be available immediately, since samples must be sent to a laboratory for analysis; this raises safety problems in the alcohol area that are of less concern in the drug area. Waiting a few days for a drug test result is still valuable, as drugs may stay

in the body for some time and the presence of drugs in urine does not necessarily mean that the person was affected by the drugs on the day tested or during the performance of safety-sensitive functions. In contrast, alcohol in the blood is affecting the person; therefore, to protect safety, it is best to determine the test result immediately to enable immediate removal from a safety-sensitive position. Blood testing also raises concern in some peoples minds because of fear of needle sticks as well as the perceived potential for spreading disease. Whether blood testing was required or simply permitted, it would require the establishment of complex collection and chain of custody procedures similar to those needed for drug testing. Its use also would require that the Department establish procedures for the certification of laboratories to do the testing, a task for which the Department lacks resources and expertise. It also would require that the federal government inspect and monitor those laboratories to ensure compliance if DOT did not find that adequate certification existed. There is currently no parallel in the alcohol area to the NIDA drug testing laboratory certification process (which the OAs rely on in their drug testing rules). Consequently, we do not propose to require or permit blood testing under the rules.

This is not to say that blood testing is not a legally valid means of establishing alcohol concentration, on the basis of which it is appropriate to take action with respect to an employee. For example, existing Coast Guard alcohol testing regulations provide for post-accident alcohol blood tests in some situations. The validity of these procedures, which are subject to evidentiary hearings, has long been recognized in administrative and court proceedings, and it is not brought into question by the Department's proposal to use breath testing in other contexts.

Some commenters noted the convenience and cost savings of using urine samples taken under the drug program for both drug and alcohol testing. Urine testing has the same drawbacks as blood testing with respect to delay in obtaining the result and the need for complicated collection, chain of custody and laboratory certification and inspection procedures. Urine alcohol testing also does not give a reliable indication of the current alcohol concentration without the time and cost of obtaining two successive urine samples. In order to establish with certainty the alcohol concentration at the time of the test, the collector must ensure that the individual completely emptied his or her bladder for the first sample; this is difficult to verify. Even with two successive samples, some experts regard the conversion factors as imprecise. While we strive for efficiency in our rulemaking, we do not believe that using urine makes sense for alcohol testing conducted to accomplish a safety objective.

Behavioral sobriety tests, while useful in conjunction with other tests, would not be a suitable method to use in our rules; they are subjective, require significant amounts of training to implement, are less reliable at the low alcohol concentrations that the OAs propose testing for, and consume a considerable amount of the tester's and the employee's time. They also cannot provide a quantified result, as required by the Act.

Part 40 proposes exclusive reliance on evidential breath test devices (EBTs) listed on NHTSAs Conforming Products List (CPL)(49 FR 48854, December 14, 1984), which sets out model specifications for EBTs used by State law enforcement officials, for alcohol testing under these rules. NHTSA carries out programs relating to the safety performance of motor vehicles and drivers and is actively involved in developing programs to reduce alcohol and other drug use among drivers. EBTs that meet NHTSA CPL specifications are highly accurate at detecting and documenting low alcohol concentrations, if they are properly calibrated and operated by trained personnel. Breath testing raises some problems with test validity and employee verification discussed earlier in the section on the public hearing. Therefore, we also propose that the EBTs would have to be capable of: (1) Printing three copies of each test result; (2) Numbering each test consecutively; (3) Processing an air blank (test of ambient air) with printed record; (4) External calibration; and (5) Distinguishing alcohol from acetone at a 0.02 concentration. Additional testing procedures to protect the integrity of the process are proposed in the part 40 procedures NPRM published elsewhere in today's **Federal Register**.

Evidential breath testing is as accurate, faster, relatively less expensive, and less invasive and frightening than blood testing. It eliminates the need for elaborate procedures for packaging, chain of custody, and laboratory certification. Since the rule would prohibit an indication of a specific concentration of alcohol in the system, there is no need for a medical review officer to interpret positive results, as is required under DOT's drug testing rules. Use of these devices is possible in all transportation settings envisioned in those industries for which the OAs are issuing rules today and provides an immediate confirmed result, which enables immediate removal of the employee who has misused alcohol. Breath testing devices have been in use a long time; all states accept breath test device results as credible evidence of an individual's violation of a law establishing a *per se* prohibited blood alcohol concentration, so long as the devices are properly calibrated and operated by trained personnel. Each device on NHTSA's conforming products list, with or without a printer, has been accepted by at least one state for use in court proceedings in that state. (Acceptance by a state of a particular device is not, however, necessary for the use of that device in that state for purposes of the DOT testing program.)

This discussion is in the context of an extensive, multi-modal testing program, including random testing as well as testing triggered by reasonable suspicion of the occurrence of an accident. Greater protections are needed in such a program, especially in the absence of procedural protections present in some existing programs that may use non-evidential testing methods in some circumstances. For example, the Coast Guard post-accident alcohol testing program can involve an administrative proceeding at which the employee has the opportunity to challenge test results before a license is revoked or an investigative inquiry at which further evidence could be introduced. In any event, the use of non-evidentiary alcohol testing devices alone would not meet the statutory requirement for verification in the testing program proposed by the five modal NPRMs and these proposed procedures.

The Department considered allowing the use of screening devices (*e.g.*, saliva and preliminary breath testers) for initial tests followed with confirmation by evidential devices. Since the Act requires a test that uses a scientifically recognized method to confirm an impermissible concentration of alcohol, employers must purchase or have access to an evidential breath test device in any event. Alcohol is processed by the body so rapidly that, particularly at low alcohol concentrations, the confirmation test must be conducted within 15–30 minutes in order to verify the initial test. The employer can use the evidential device both for the initial and confirmation tests. Using screening devices would not cut the costs of the program since the per test costs of the screening devices would exceed those of the already purchased EBTs. In addition

to the cost of purchasing and using screening devices, some of those devices are less accurate and would record false positives, directing more employees to the confirmation test at greater cost to the employer. In addition, at lower alcohol concentrations, they may record false negatives; i.e., they would not identify all persons with prohibited concentrations of alcohol for confirmation testing, allowing some violators to escape detection. Finally, it would be difficult for the employer to establish that the initial tests had been conducted to establish compliance with the rules because they could not provide the same type of record as the evidential breath devices. Comment is specifically sought on whether the requirement for EBTs for screening purposes is too restrictive. If screening devices were to be allowed, other procedural requirements of these rules and the proposed part 40 would need to be changed. For example, since screening devices are not capable of recording the sequential number and result of the initial test, what other records would suffice, if any, to satisfy the verification needed?

We are proposing the only testing method and testing devices that currently meet the criteria that the Department has determined are necessary to the success of these programs. At this time, none of the alternative testing methods of which we are aware is now appropriate for use in these proposed programs. While there may be some promising techniques under development that someday may satisfy the Department's criteria, they are not sufficiently developed to warrant inclusion in this rulemaking at this time. If, in the future, the current drawbacks of alternative testing methods are resolved or other testing devices are developed that have the requisite capabilities, we will consider permitting their use for alcohol testing under these rules.

Definitions

Some of the definitions, such as those defining *accident, covered employee,* and *safety-sensitive function,* among others, will be different in each OA NPRM based on differences in the individual regulated industries; some, such as *consortium,* are umbrella definitions that include all of the customary terms used in the different industries. Other definitions are identical in all of the OA NPRMs. *Alcohol concentration* in all of the proposed rules means the alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by an evidential breath test under these rules. For example, an alcohol concentration of 0.04 means 0.04 grams (four one-hundredths of one gram) of alcohol in 210 liters of expired deep lung air. This breath standard is equivalent to a blood alcohol concentration of 0.04.

The definition of *alcohol use* means consumption of any beverage, mixture, or preparation, including any medication, containing ethyl alcohol. Since ingestion of a given amount of alcohol produces the same alcohol concentration in an individual whether the alcohol comes from a mixed drink or cough syrup, the Department would apply the prohibitions in these rules to the use of any substance containing alcohol, such as prescription or over-the-counter medication or liquor-filled chocolates. Allowing an exception for medication would make it very difficult, if not impossible, to enforce the rules. Moreover, alcohol-based drugs could be used to satisfy alcohol needs rather than medical needs, if permitted. We believe there are now non-alcohol alternatives for all non-prescription medications, but we specifically seek comment on this. Prescription medications containing alcohol may have a greater impairing effect due to the presence of other elements, *e.g.*, antihistamines. We are not aware of prescription medications used (over a long term) that cannot be formulated in an aqueous preparation and that would themselves be safe to use while at work. We request comment on prohibiting use of all medications containing alcohol. Should we also prohibit possession of such medications while performing safety-sensitive functions? What hardship would this prohibition cause? We recognize that operators who take their vehicles home may stop at the drug store to pick up medications on the way home.

The proposed definition of *substance abuse professional* (SAP) encompasses licensed physicians, limited to medical doctors and doctors of osteopathy; as well as licensed or certified psychologists, social workers and employee assistance professionals. All of the categories listed must have knowledge of and clinical experience in the diagnosis and treatment of alcohol-related disorders. We specifically request comment on whether there is any other professional classification that we should include.

Preemption of State and Local Laws

The Act contains an express preemption of State and local requirements that are inconsistent with the Federal alcohol rules applicable to the aviation, highway, and transit industries. Through its implementation of the Hazardous Materials Transportation Act (HMTA), the Department has long interpreted statutory preemption under an inconsistency standard by using a two-pronged test. The test was derived from Supreme Court decisions on preemption under the Constitution, has been followed successfully by the Department, and has been upheld by court decisions on preemption under the HMTA. In 1990, at the request of the Department, Congress recognized this long-standing interpretation by incorporating it into the statutory preemption provision of the HMTA. (49 U.S.C. App. 1804) The proposed rule would adopt this interpretation of the inconsistency standard for preemption by incorporating the two-pronged test.

Generally, the OA rules would preempt any state or local requirement if it is not possible to comply with both the Federal and the State or the local requirements or if compliance with the State or the local requirement would frustrate the Federal requirement. For example, a State requirement prohibiting the alcohol testing of transit employees would be preempted. Also a local requirement for a blood test to confirm alcohol use by a commercial truck driver would be preempted since it would frustrate accomplishment of the Federal rule by adding additional complicated procedures that may make it difficult to fully and accurately comply with the DOT procedures and by adding costs that may make compliance impossible for many companies. The rules would not preempt provisions of state criminal law that impose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property, whether the rule applies specifically to transportation employees or employers or to the general public.

The purpose of preemption is to avoid the confusion and expense of inconsistent requirements for employers or testing entities that operate in several states and to prevent interference with the functioning of the Federal program by extraneous, burdensome requirements that may defeat its purpose and benefits by making effective implementation difficult or impossible (*e.g.*, by requiring that employers pay for any rehabilitation or requiring confirmatory tests beyond those required by DOT). Because of the nationwide application of the Federal program and the interstate nature of the operations covered, even minor requirements in the aggregate may become unduly burdensome. For this reason, we intend to scrutinize closely State and local requirements under this

preemption authority. FRA operates under a statute with different preemption language; this is discussed further in the preamble of the FRA NPRM.

Other Requirements Imposed by Employers

Except as provided in the OA rules, employers retain their existing authority with respect to alcohol testing and termination or rehabilitation of their employees and employees retain their rights with respect to the use or possession of alcohol. An employer may continue to conduct an alcohol test under his/her own authority and conduct substance abuse rehabilitation programs. Employees are free to consume alcohol on their own time so long as that consumption does not violate any of the provisions of these rules or other applicable rules. Employers and employees are not free, however, to bargain away any of the requirements of the proposed rules. Whatever rights they may have to bargain collectively or otherwise agree on employer-employee relations, they cannot change or ignore Federal safety standards.

Requirement for Notice

Before performing an alcohol test under these rules, the employer must notify the employee being tested that the alcohol test being administered is required by these rules. The notice can be oral or written. An employer shall not falsely represent that a test administered under other authority is being administered under federal rules. We seek comment on whether the testing form proposed by part 40 is sufficient to constitute adequate notice.

Starting Date for Alcohol Testing Programs

The attached OA proposed rules discuss the specific implementation schedules for each industry. The requirements would be similar to those under the DOT drug testing rules. Generally, large employers would have one year from the effective date of the final rules in which to implement the requirements and small employers would have two years. Some variations justified by industry differences are noted in the OA proposals; FAA and FRA have a three tier phase-in for covered employers and contractors. The timetables generally would allow smaller employers to join alcohol misuse programs already established by larger employers or preexisting consortia, which should reduce their costs. The implementation schedules also take into account the time needed by the manufacturers to produce the required breath test devices. All employers must have an alcohol misuse program in place two years after the effective date of the rules. Thus, employers that begin to operate after the effective date of these rules must have their programs in place by the deadline according to size or by the time they initiate their operation, whichever is later.

Prohibitions

General

The OAs' drug testing rules target drug *usage* by covered employees, regardless of whether the use occurred on- or off-duty. A verified positive drug test indicates illegal use, whenever the drug was used. Moreover, it is not possible to determine, based on a chemical test, at what amount a particular drug impairs each user's performance of particular functions and thus could have safety consequences, so the mere presence of the drug must be prohibited. Data relating body fluid concentrations of alcohol to performance degradation is more extensive than that available for drugs. However, it is not possible to relate a given alcohol concentration definitively to impairment in specific individuals. The OAs therefore propose the following combination of prohibitions designed to prevent any adverse alcohol effect on a covered employee during performance of safety-sensitive functions.

Alcohol Concentration

As noted above, unlike some other drugs, alcohol is a legal substance with legally and socially acceptable uses for persons 21 years of age and older. The Department already has some prohibitions on alcohol misuse. Most of the OA's regulating commercial transportation (FAA, FHWA, FRA and USCG) have selected a 0.04 alcohol concentration as the *per se* standard for determining whether an individual is under the influence of alcohol, and prohibit any use of alcohol on the job. Some OA's (FAA, FHWA and USCG) subject certain persons to pre-duty abstinence periods. FHWA rules require that commercial vehicle operators with any measurable alcohol concentration be placed out-of-service for a 24-hour period. RSPA and FTA currently do not have alcohol concentration prohibitions.

Today's proposed rules would prohibit covered employees from reporting for duty or remaining on duty requiring the performance of safety-sensitive functions while having an alcohol concentration of 0.04 or greater. They define alcohol concentration in terms of breath, not blood testing, and would specifically relate a violation of this prohibition to the alcohol concentration as indicated on the breath testing device to avoid problems associated with an absolute breath to blood correlation. In addition, no employer who actually knows that an employee has that concentration could permit the employee to perform or continue to perform safety-sensitive functions.

An alcohol concentration of 0.04 represents the point at or above which impairment for most individuals rises dramatically, thus justifying its use as a *per se* standard for commercial transportation employees. Studies about the effects of *any* alcohol, however, raise our concern about the effects of lower alcohol concentrations on transportation employees. For example, the National Academy of Sciences (NAS) noted that several credible studies measuring task performance at low blood alcohol concentrations indicate that, "[a]lthough individual reactions to alcohol vary depending on * * * [various] factors * * *, sensory and cognitive performance is significantly reduced at or below 0.04 percent BAC." (Zero Alcohol, 1987) The study concluded that "across broad populations of drivers, BACs exceeding about 0.04 to 0.05 clearly increase the probability of causing a crash. * * * [W]hen the driver's age and experience with alcohol are controlled for statistically, the risk of crash involvement increases at any recorded BAC above zero."

A recent National Highway Traffic Safety Administration (NHTSA) report to Congress stated that "[a]lthough the effects of alcohol on impairment and crash risk appear more dramatically above 0.05 or 0.08, for some drivers, any measurable alcohol puts them at increased risk." It noted that relatively few studies have looked at alcohol concentrations below 0.04; therefore, only a small number of studies have found clearly impairing effects for alcohol concentrations below 0.04. NHTSA noted that individuals performing more complex tasks (especially those involving a subsidiary task requiring time-sharing or divided attention) often show evidence of impairment at alcohol concentrations as low as 0.02. NHTSA concluded that one cannot specify an alcohol concentration above which all drivers are dangerous and below which they are safe or at "normal" risk. The NAS and the National Transportation Safety Board (NTSB) have favored setting an explicit policy of zero BAC. The NTSB said that "[i]t should be absolutely clear that no

alcohol is acceptable in commercial transportation because research has demonstrated that low blood alcohol levels can produce impairment." The Transportation Research Board, in a study performed for the FHWA during its Commercial Driver's License rulemaking, recommended a 0.04 BAC as the concentration where the serious penalties should apply to commercial motor vehicle drivers, but it noted that some degree of impairment such as slowed reaction time, loss of coordination, and deterioration in judgment begins with any BAC above zero. (Zero Alcohol, 1987)

Having any standard other than 0.00 raises troubling questions about whether an employer should allow an employee whose test shows an alcohol concentration between 0.00 and 0.04 to continue performing a safety-sensitive function. Clearly, the Department's concern about public safety and an employer's additional concern about liability are raised in a situation in which an employee "passed" a test with an indicated alcohol concentration below 0.04 and then begins or resumes performing safety-sensitive functions. The likelihood of being involved in an accident when performing safety-sensitive functions with a measurable alcohol concentration is increased. Therefore, we propose a two-tiered system of consequences discussed in detail later in this document. The covered employee must be removed from a safety-sensitive position at any alcohol concentration of 0.02 or greater. If the employees alcohol concentration is 0.02 or greater but less than 0.04, the employee would not be allowed to perform safety-sensitive functions until the next scheduled duty period (usually the next day), if at least eight hours has elapsed, or until a retest shows the alcohol concentration has fallen below 0.02. If the employee has an alcohol concentration of 0.04 or greater, the employee could not return to a safety-sensitive function until evaluated, treated, if applicable, and retested. In either case, the employee would be prevented from posing any danger to the public.

The Department has used the 0.02 alcohol concentration rather than 0.00, because it represents the lowest level at which scientifically accurate alcohol concentration can be measured given the limitations of any current technology (*e.g.*, blood, breath). Results below 0.02 are not statistically significant and would be forensically insufficient to support consequences under these rules. In essence, use of a 0.02 standard represents a zero tolerance standard for alcohol. NHTSA's model specifications for devices on the CPL were developed for police use under criminal laws prohibiting alcohol concentrations of 0.10 and above. Although all of the EBTs on the CPL exceed existing requirements, NHTSA plans to modify the model specifications and certify the devices at the 0.04 and 0.02 alcohol concentrations. The NHTSA proceeding would respond not only to these rulemakings, but also to the ongoing efforts of States to lower prohibited alcohol concentrations to 0.08 (0.02 for drivers under 21) and to the prohibition on 0.04 alcohol concentration or greater for commercial drivers.

Behavior and/or Appearance

The proposed rules would prohibit an employee from reporting for duty or remaining on duty requiring the performance of safety-sensitive functions while the employees behavior and/or appearance is characteristic of alcohol misuse or the employee's ability to perform his or her assigned functions is adversely affected by alcohol use. The proposed rules would prohibit an employer who actually knows the covered employee is in violation of this prohibition from permitting the employee to perform or continue to perform safety-sensitive functions. An employer observing such behavior and/or appearance would be required to conduct a reasonable suspicion test under these rules.

The time-frame for testing is limited because the body rapidly eliminates alcohol. This prohibition is therefore needed for circumstances in which it is infeasible or impossible to conduct a reasonable suspicion test in a timely manner (*e.g.*, an EBT is unavailable or broken). People are more familiar with the symptoms of alcohol intoxication than those of drug use; moreover, the presence of alcohol is easier to detect from physical symptoms (*e.g.*, breath) or behavior (*e.g.*, inability to walk a straight line), although alcohol symptoms often can be successfully masked. However, since observable alcohol-related behavior tends to become apparent only at fairly high alcohol concentrations—generally 0.12 and higher—, it is unlikely that misuse would be detected in this manner at alcohol concentrations in the 0.02–0.04 range. Thus, there are important safety reasons for requiring that an employee be removed from his or her safety-sensitive function based on behavior and/or appearance alone.

To the extent some OAs already permit removal of an employee based on observation alone, the employee has a right to an evidentiary hearing (*e.g.*, as part of a certificate revocation action). These rules would not provide for a right to a hearing. Under the proposed rules, a violation of this prohibition would require removal from a safety-sensitive position, and evaluation by a SAP. Rehabilitation, if necessary, and a determination that the employee is ready to return to duty as well as a result below 0.02 on a return-to-duty test would be required before the employee could be reinstated. Because this proposed prohibition involves a subjective determination, unverified by a test, and may provide an opportunity for the employer to harass an employee, should lesser consequences for violating this prohibition apply, *e.g.*, removal from the safety-sensitive function for 8 hours or until obtaining a result below 0.02 on a return-to-duty test? Would a lesser consequence under these rules impinge upon the employer's need to retain their authority to remove employees on this basis? The lesser consequences would not include a SAP evaluation. Should not a SAP evaluate the employee in view of the seriousness of his or her offense (observable alcohol-related behavior and/or appearance generally occur at high alcohol concentrations)? Is this any less of a safety concern because the decision is made based on a subjective observation?

On-Duty Use

The proposed rules also would prohibit a covered employee from using alcohol while performing safety-related functions and prohibit an employer who actually knows of such use from allowing the employee to perform or continue to perform safety-sensitive functions. The need for this prohibition is self-evident. Should this prohibition extend also to possession of alcohol on the job? What problems would such a prohibition raise? See the above discussion concerning the proposed prohibition on use of medications.

Pre-Duty Use

Drinking during off-duty periods may impinge upon a person's ability to function safely on the job. The proposed rules generally would prohibit a covered employee from using alcohol within the four hours preceding the performance of safety-sensitive functions. They also would prohibit an employer, who actually knows that the employee has used alcohol within that period of time, from allowing the employee to perform or continue to perform safety-sensitive functions. The FAA's long-standing eight-hour pre-duty use prohibition for crewmembers would remain in effect under its proposal. Because duty tours often are not predictable in the rail

industry, the four-hour period would be shortened for unscheduled assignments to the interval between being "called to duty" and "reporting for duty."

The Department specifically requests comment on a number of questions concerning pre-duty abstinence. Is the proposed abstinence period necessary if testing is required? Is it still valuable as an extra enforcement tool? Is it valuable for public perception; *i.e.*, should the Department consider public concern at seeing pilots drinking in an airport lounge or truck drivers drinking at a roadside restaurant, even though when they report for work a short while later they have no alcohol in their systems? Is four hours reasonable? Should all persons within an industry be subject to the same pre-duty limits, or do certain professions carry an extra duty of care? Does it matter that in some industries, lengthy abstinence periods may bar any drinking for days or weeks, because of the nature of work/rest shifts?

Use Following an Accident

Since it is important to determine whether alcohol is implicated in an accident, a covered employee who has actual knowledge of an accident in which his or her performance of a safety-sensitive function has not been discounted by the employer as a contributing factor to the accident would be prohibited from using alcohol for eight hours following the accident. The prohibition would end once the covered employee has taken a post-accident test under these rules or the employer has determined that the employee's performance could not have contributed to the accident.

The Department is aware of accidents in which employees who should have been tested after an accident left the scene and may have consumed alcohol. This rule would prevent employees who know they are subject to testing from explaining "positive" findings on an alcohol test by alleging they had a drink after the accident, since such action also would constitute a rule violation. In some situations, the employee involved in an accident may not know of the accident. For example, a mechanic makes a mistake that causes an accident hours later or half a continent away. Without actual knowledge of an accident, we do not believe a ban on drinking could be effectively enforced, but we specifically seek public comment on how to address this situation. See specific OA proposals that limit the application of this prohibition to performance of a safety-sensitive function at or near the time of the accident or on the vehicle or aircraft involved. Also, the FRA proposal does not include this requirement because under current FRA rules the employees involved remain on duty status after an accident.

Refusal to Submit to a Required Alcohol Test

The proposed rules would prohibit a covered employee from refusing to submit to required post-accident, random, reasonable suspicion or follow-up alcohol tests. This, in effect, provides that the employee must take those tests when required. The consequences for a refusal to submit to a required test would be the same as if the employee had tested at 0.04 or greater or had violated any of the other prohibitions in these rules. Failure to provide adequate breath for testing when required without a valid medical explanation or engaging in conduct that clearly obstructs the collection process would constitute a refusal to submit to testing. A covered employee subject to a post-accident test who leaves the scene of the accident without a valid reason before being tested would be deemed to have refused to submit to a required test. The proposed rules would prohibit an employer from permitting an employee who refuses to submit to testing to perform or continue to perform safety-sensitive functions. In addition, the FRA proposal would prohibit anyone refusing a required test from engaging in covered service for nine months. The FHWA would disqualify drivers for one year following a refusal.

An applicant's or employee's refusal to submit to a pre-employment test or a return-to-duty test would not trigger consequences under the rules that result in the need for evaluation. In those cases, the applicant or employee does not have to be removed from a safety-sensitive position. Since those tests are a condition precedent to starting or returning to safety-sensitive functions, the applicant or employee simply could not be hired or returned to duty.

Tests Required

General

In the Department's drug testing rules, we generally required pre-employment, periodic, reasonable cause/suspicion, post-accident and random tests (testing also is required for employees who seek to return to work following a positive test or refusal to submit to a test). The Act requires all these forms of testing except periodic tests, which generally are performed as part of required physical examinations for certification for some employees. Although periodic tests are discretionary under the Act, the Department has decided not to propose either requiring or authorizing periodic testing for alcohol at this time. We question its value with respect to alcohol if the employee would know when the test was to be conducted. We specifically request public comment on the utility of periodic testing. Would such a test be more likely to identify an alcohol misusing employee than existing safeguards or the provisions of these proposed rules? The tests required by these rules would be conducted after a triggering event (pre-employment/pre-duty, post-accident, reasonable suspicion, return-to-duty, follow-up or retest) and just before, during or just after performance of a safety-sensitive function (random).

Pre-Employment/Pre-Duty Testing

The Act requires pre-employment testing, which we noted in our ANPRM is one of the least useful types of tests when dealing with alcohol, because drinking off duty generally is legal and because alcohol remains in the body for such a short period of time. Often, a test result indicating alcohol use may only indicate bad judgment or bad timing (*e.g.*, one notices an employment advertisement after having beer and a hamburger for lunch, immediately applies, and is tested.) The drugs for which DOT requires testing are illegal at any time used and can stay in the body for a fairly long time, so pre-employment testing for illegal drugs makes more sense. In fact, some employers have detected a high rate of positives (3–8 percent in the transportation industry) from DOT-required pre-employment drug testing. Pre-employment tests comprise a large and costly portion of the total number of drug tests given, especially in industries with large employee turnover.

To make such a test more meaningful, we are proposing that a covered employee shall undergo alcohol testing any time prior to the first time the employee performs safety-sensitive functions for an employer. The employer would have the option of testing during the hiring process or before (preferably just before) the employee starts performing safety-sensitive functions. The latter option would enable the employer to avoid the cost of testing several applicants for each job, tie pre-employment tests to the performance of safety-sensitive functions and accommodate the statutory language requiring a pre-employment test for an "employee," rather than an applicant. The former option would permit identification of someone with alcohol in his/her system before incurring additional hiring

expenses. For the above reasons, the definition of "covered employee" used in these rules would include applicants for a safety-sensitive function as well as current employees applying to move into a safety-sensitive function. The rules would not confer any rights or consequences upon applicants or employees who fail a pre-employment test.

The rules would prohibit an employer from allowing an employee to perform safety-sensitive functions unless that employee has been tested with a resulting alcohol concentration less than 0.04. If the pre-employment/pre-duty test result indicates an alcohol concentration of 0.02 or greater but less than 0.04, the employee cannot perform or be allowed to perform safety-sensitive functions until the alcohol concentration falls below 0.02 on a subsequent test or until the next scheduled duty period, if it is not less than eight hours following the test.

The rules would not require an employer to administer a pre-employment test if the employee has had an alcohol test conducted under an OA alcohol misuse rule following part 40 procedures with a result less than 0.04 within the previous six months and the employer ensures that no prior employer of whom the employer has knowledge has records showing a violation of these rules within the previous six months. Generally, this means that when checking a prior employer to verify that the applicant had "passed" a previous alcohol test, the new employer would also verify that the prior employer has no records of a violation of an OA alcohol misuse rule. If the new employer knows the applicant had other employers within the last six months, the new employer would have to check them too. Does it make sense to restrict the latter requirement to six months? This option would provide the greatest flexibility for avoiding the constant retesting and related costs involved in an industry, such as trucking, which has a high employee turnover rate. The FHWA drug testing regulations currently allow a similar option for pre-employment tests. Should this option also be extended to the aviation, rail, mass transit and pipeline industries? An employer, of course, could choose to conduct pre-employment tests in lieu of reviewing information on past employment provided by the employee.

Should employers be required to give notice that a pre-employment test will be conducted to avoid the lunch situation described above? Should there be more serious consequences for failure of the test if such notice is given? Should an alcohol concentration of 0.02 be the standard for a pre-employment test, if, for example, a 24-hour notice were required? Should not the employer expect an applicant given such notice to have no alcohol in his or her system? Would not presence of any alcohol after such notice indicate a serious problem with the applicant? What cost or implementation problems would be associated with such notice, particularly for smaller employers? Would they be mitigated by a shorter notice period, such as eight or four hours? Eight hours generally represents the loss of a work day, which may impose hardship on some businesses. Four hours, the pre-duty abstinence period for most covered employees, may make more sense. Should applicants be allowed to waive such notice? Would such a waiver truly be a voluntary act? If not, should it matter? Would a waiver option introduce unfairness into the process for those who would prefer to wait the designated amount of time, since the employer may simply hire an individual who waived the right to wait before being tested?

Post-Accident Testing

Post-accident alcohol testing already is required by federal regulation in some transportation modes, and serves as a valuable accident investigation and enforcement tool. States also conduct post-accident tests, depending upon the circumstances. Post-accident testing for alcohol at remote locations can be more difficult to accomplish than drug testing, because alcohol passes from the blood and breath more quickly than most drugs. Also, delays in transporting trained personnel to an accident site can result in negative or inconclusive tests. The current drug rules of those OAs involved in this rulemaking proceeding require employers to test employees involved in an accident as soon as possible, but not later than specified maximum time limits (generally 32 hours).

The definitions of accidents or occurrences that would trigger a post-accident test vary by industry and are discussed in each OA's proposed rule. They generally are the same as the triggering events for post-accident drug testing. We are generally proposing that as soon as practicable following an accident, each employer shall test each surviving covered employee for alcohol, if that employee's performance of a safety-sensitive function either contributed to an accident or cannot be completely discounted as a contributing factor to the accident. The need for testing is presumed; any decision not to administer a test must be based on the employer's determination, using the best information available at the time the determination is made, that the employee's performance could not have contributed to the accident. See the OA proposed rules for additional events that trigger post-accident testing or for modifications to the general approach.

Any employee subject to post-accident testing who leaves the scene of an accident without a valid reason before the test is administered can be deemed by the employer to have refused to submit to testing; such a refusal is treated as if the employee recorded a test result of 0.04 or greater. The employer is responsible for judging the validity of the reason and generally must report the incident to the OA regulating the employer's industry. Where possible, employers should make every effort possible under the circumstances surrounding the accident to ensure that the employee is available for a post-accident test. This, of course, does not mean that necessary medical treatment for injured people should be delayed or that an employee cannot leave the scene of an accident for the period necessary to obtain assistance in responding to the accident or to obtain necessary emergency medical care.

Because alcohol is eliminated from the body so quickly, using a 32-hour maximum limit as in the drug rules would be inappropriate. It is important that a post-accident test be administered as soon as possible to provide any information on whether alcohol misuse was a possible cause of or contributor to the accident. If a post-accident test is not administered within two hours following the accident, the employer would have to submit a report to the OA stating why the test was not promptly administered. If a post-accident test is not administered within eight hours following the accident, there is little likelihood of finding a meaningful alcohol concentration resulting from use preceding the accident. The employer then would have to cease attempts to administer the test and the report to the OA must explain why the employer was unable to administer a test. The Department recognizes there will be valid reasons for not conducting the tests in these timeframes, but every effort must be made to do so. It is important to note that this test is not meant to be a full toxicological workup for the purpose of determining accident causation. The primary purpose of the test is to determine whether the employee(s) involved should be removed from safety-sensitive functions.

FHWA is considering allowing employers to substitute a post-accident test administered by on-site police or

public safety officials, particularly if that test can be administered earlier than the employer can get to the scene. These local authorities often are first to arrive at an accident site, particularly if the accident occurs in a remote area, and sometimes are equipped to conduct field alcohol breath tests. We seek public comment on whether to allow employers to authorize, where feasible, on-site police or public safety officials to carry out post-accident testing, if they are first to arrive at the scene of the accident and they determine there is reason to test. To what degree should we allow employers to rest on the assumption that local police will administer an alcohol test, which presumably would be based only on local authority? How could we ensure cooperation in getting test reports from the police? How would conducting such tests deviate, if at all, from part 40 procedures or applicable DHHS guidelines? Is it possible to ensure employee rights, such as privacy, in that context? Is it only necessary that the test comply with the requirements applicable to the local authorities conducting it? We would not want to permit this option if police or public safety officials would use the results of the tests against the employee in a criminal proceeding where the local authority did not have independent probable cause to test. FRA has its own preexisting procedures for conducting a full toxicological analysis following an accident; see the FRA NPRM for its post-accident testing proposal.

Random Testing

In the ANPRM, commenters were requested to focus on how the objectives of random alcohol testing (*e.g.*, deterrence and detection) could be accomplished. The deterrent effect of random alcohol testing might not equal that provided by random drug tests, because alcohol is so rapidly eliminated from the body that violators are more difficult to detect. In view of the fact that alcohol is legal, we asked what is the significance of a random alcohol test of an employee indicating use. Random alcohol breath testing is considered a federally-mandated "search," under the Fourth Amendment. Accordingly, the proposed programs for detecting the misuse of alcohol promote our compelling interest in ensuring transportation safety. One option that we considered in the ANPRM was a "pre-performance" random testing requirement limited to the specific times an employee begins to perform a safety-sensitive function. That limitation provides the requisite nexus to ensuring proper performance of safety-related functions that is our primary concern and the principal purpose of these rules.

We are proposing to require random alcohol testing that is limited to the time period surrounding the performance of safety-related functions. An employee could only be tested while the employee is performing safety-sensitive functions, just before the employee is to perform safety-sensitive functions, or just after the employee has ceased performing such functions. Obviously, the best time to test is before the employee begins to perform the safety-sensitive function. Detection at that point would prevent the employee from actually performing the function while he or she had alcohol in his or her system. However, if the employee understands that a random test would only be administered before he or she begins work and there is an opportunity to drink during work, deterrence is limited. The ability to test just before, during or just after performance increases the deterrent effect and may enable detection of employees who use alcohol on the job. The purpose of the concept of "just before" and "just after" is to avoid the problem that some safety-sensitive functions could not be interrupted for the performance of a test (*e.g.*, piloting an aircraft). It is intended to be close enough to the actual performance of the safety-sensitive function, however, that the test results would clearly indicate that the employee would be or was at 0.04 or above (or 0.02-or greater but less than 0.04) at the time when performing those functions. The rules also would provide that employers require that each covered employee selected for random testing proceed to the testing site immediately. In the event the employee is performing a safety-sensitive function when notified, the employer must ensure that the employee ceases the function consistent with safety and proceeds to the site as soon as possible. Should there be specific time limits on how long before or after performance of a safety-sensitive function a test can be given and still be reasonably performance-related? What period of time would make sense in view of the fact that the unannounced nature of the test provides its deterrence?

The rules would require each employer to randomly select covered employees at various times for unannounced alcohol testing. The employer must select covered employees for testing through a scientifically valid method, such as a random number table or a computer-based random number generator that is matched with employees' Social Security numbers, payroll identification numbers, or other comparable identifying numbers. Each covered employee must have an equal chance of being tested under the random selection process used. During each year following the start of the employers random testing program, the employer would have to meet certain conditions: (1) The dates for administering random tests would be spread reasonably throughout the year (the deterrent effect would disappear if employees know that the employer had completed all required random tests for the year); and (2) The number of employees randomly selected for testing during the year would equal an annual rate of not less than a specified percent of the total number of employees subject to alcohol testing. Testing dates should not be predictable (*e.g.*, every Monday or the first week of each month). Because of the randomness of the testing, some employees may be tested more than once during the year, while others will not be tested at all.

Random testing pools could be formed in a variety of ways. To promote efficiency and reduce costs, particularly for smaller employers and employers subject to more than one OA rule, we permit the combination of geographically-proximate employees covered by different OA rules into one pool. To maintain fairness and the equal chance of each type of employee for selection, certain conditions could be set. For example, employees in any industry who travel most of the time could constitute one pool; others who remain in the vicinity of the testing site would be in another. However, if the testing method chosen required testing of employees immediately upon selection or whenever they first returned to the testing location after their selection (but still unannounced), there would be no need for separate pools. Any acceptable method must ensure that each employee has an equal chance of being selected for testing. Although these multi-modal pools would be permitted, other specific OA requirements might have to be met such as the FAA proposal to require prior approval of random testing pools.

If the employer joins a consortium, the rules would permit the calculation of the annual rate on either the total number of covered employees for each individual employer or the total number of covered employees subject to random testing by the consortium's pool covering the employer. This would mean that a consortium member could have less than its required number of random tests conducted if the overall consortium rate equals the required rate. Thus, if Employer A has ten covered

employees and the consortium has 500 covered employees in the pool covering Employer A, and a 50 percent rate applies, if Employer A chooses to have the rate based on the consortium, the consortium must conduct at least 250 tests even if only four or fewer covered employees of Employer A are tested. So long as each employee has an equal chance of being tested each time the consortium conducts random tests, the requisite deterrence factor remains. Membership in a consortium should improve deterrence for small companies because their employees would continue to perceive an equal chance of being selected throughout the year; it would avoid the situation where an employer of two conducts the one required test in June and both employees know they will not be tested for the remainder of the year. On the other hand, the relative perception of vulnerability to testing may lessen when a small group of employees is included in a larger pool and over time few members are selected.

We request comment on what annual rate to require for random testing within a 10 to 50 percent range. Under the Department's current drug testing rules, employers must conduct random drug tests at a 50 percent annualized rate; that is, the number of annual random tests conducted equal half the number of the covered population. We are asking for comment on whether the rate for alcohol can be lower because alcohol symptoms are somewhat better known and easier to detect. A greater chance of detection is one factor in deterrence and may provide a rationale for a lower testing rate. The Department currently believes that the higher the percentage, the greater the likely deterrence and detection. But costs also rise as the number of tests increases. What percentage best balances deterrence, detection, and cost? Commenters should note that the Department is publishing a separate ANPRM in today's **Federal Register** that seeks comment on whether there are less costly alternatives to the current drug random testing programs that could maintain an adequate level of deterrence and detection of illegal drug use.

In addition, the FRA currently is conducting a limited study of the effectiveness of random drug testing at a 25 percent rate; the results should be available as we are preparing the final alcohol misuse rules and may be helpful in determining the appropriate random rate for alcohol.

We specifically request commenters to provide extant data from their experience testing at different random rates in programs that are comparable to the OA proposals. We welcome comment on the applicability of data from one industry to another and from outside the transportation community. We also request comment on the relationship between drug random testing and alcohol random testing rates. In addition, we seek comment on how employers with large seasonal variances in numbers of covered employees should address the computation of the numbers of tests required?

Reasonable Suspicion Testing

Because alcohol use (at least at higher consumption amounts) often results in more observable symptoms than other drug use, and because more research has been done on how to train people to make these observations, reasonable suspicion testing may be more valuable for alcohol than for illegal drugs. Supervisor observation is not a complete solution, however; "practiced" drinkers often can mask symptoms (*e.g.*, they can walk a straight line) and avoid detection. Also, supervisors may have reasons to overlook employee alcohol use (*e.g.*, sympathy for the employee, the desire to avoid confrontation, or the lack of a readily available replacement). The U.S. Army has found that supervisors have a tendency to underreport alcohol involvement in accidents (The Alcohol and Accidents Guide, February 1987).

The OA NPRMs would require employers to test covered employees for alcohol when the employer has reasonable suspicion to believe that the employee has violated the prohibitions in these rules. The employer's determination that reasonable suspicion exists to require an alcohol test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odors of the employee. Reasonable suspicion testing under these rules would be authorized only if the required observations are made during, just preceding or just after the period of the work day that the covered employee is performing a safety-sensitive function. A covered employee would be required to undergo reasonable suspicion testing for alcohol as soon as possible; such testing could occur while the employee is to perform safety-sensitive functions, just before the employee is to perform safety-sensitive functions, or just after the employee has ceased performing such functions.

The factors set out for determining when reasonable cause exists, in the drug rules and in the alcohol NPRMs, are short-term factors. They focus on what a supervisor sees at the present moment. The Department seeks comment on whether it is also appropriate for supervisors to take into account longer-term factors (*e.g.*, a long-term decline in work performance, patterns of absenteeism, lateness, or abuse of sick leave). Such factors would be considered only in conjunction with the shorter-term observations by supervisors, however.

Our drug rules require that two supervisors, at least one of whom is trained in detecting the symptoms of drug use, make the required observations and concur in the existence of reasonable suspicion. These proposed rules generally would allow a single supervisor trained in detecting the symptoms of alcohol misuse to make the required observations and determine the existence of reasonable suspicion. The rationale for allowing the testing decision to rest on one trained supervisor is that alcohol testing is too time-sensitive to incorporate as a general rule the time it takes to consult a second supervisor, which is difficult in some transportation industries. Symptoms of alcohol use also are more widely-known and easier to detect than those of drug use so there may be less need for corroboration. In addition, the supervisor who makes the determination that reasonable suspicion exists, generally is prohibited from conducting the reasonable suspicion test on that employee. The latter prohibition, like the requirement for two supervisors in the drug rules, is designed to protect against a supervisor's harassment of a specific employee. In some cases, the Breath Alcohol Technician (BAT), who conducts the test, may be there in time to provide corroboration of the employee's appearance and behavior.

We request public comment on allowing a single trained supervisor to make the decision to order a reasonable suspicion test. Should this be restricted in any way to avoid the perception of greater opportunity for harassment by supervisors? How could this be reasonably accomplished in light of the above concerns? We also request comment on the possibility of allowing a supervisor to base a decision to order a reasonable suspicion test on reports by a credible third person who has made the observations. Should specific industry/federal government rule violations also be an occasion that requires an alcohol test? The railroad industry has operated with rules that authorize the employer to test under these circumstances for several years. What events should trigger testing, if any?

Return-to-Duty Testing

The OA rules would require each employer to ensure that a covered employee, who has violated any of these alcohol misuse rules, has been evaluated and undergoes an alcohol test with a result indicating an alcohol concentration of less than 0.02 before returning to a safety-sensitive function. We believe that compelling concerns about safety and possible recidivism justify imposing a stricter 0.02 standard for those employees returning to safety-sensitive functions after they already have demonstrated problems with alcohol. In any event, under other provisions of the rules, employees could not perform safety-sensitive functions until they have a result lower than 0.02; since this test is specifically for return-to-duty, the application of the 0.02 standard would be logical. We specifically request comment on whether this is a good rationale for imposing a stricter alcohol concentration standard on individuals returning to duty.

Follow-Up Testing

The alcohol ANPRM asked numerous questions on return-to-duty or follow-up testing, *i.e.*, testing required of a covered employee who has violated the alcohol rules, undergone rehabilitation, and has been returned to duty to perform safety-sensitive functions. Many of these questions were premised on the rehabilitation/Medical Review Officer (MRO) evaluation that occurs in the illegal drug area. As discussed later in this preamble, an employer would have the option of allowing an employee to return to safety-sensitive functions after SAP evaluation, rehabilitation (if needed), and a successful return-to-duty test. Once an employee's alcohol problem has been identified, there is a chance of recidivism and a need to ensure continued disassociation from alcohol through periodic unannounced follow-up testing.

The OA rules would require that each covered employee who has been identified by an SAP as needing assistance in resolving problems with alcohol misuse, and who has returned to duty involving the performance of a safety-sensitive function, shall be subject to a minimum of six (6) unannounced, follow-up alcohol tests administered by the employer over the following twelve (12) months. The SAP could direct additional testing during this period or for an additional period up to a maximum of 60 months from the date the employee returns to duty. The SAP could terminate the requirement for the follow-up testing in excess of the minimum at any time, if the SAP determines that the testing is no longer necessary. Should the rule establish this minimum requirement or should any follow-up testing be based only on the SAP's discretion? Is it appropriate to vest this responsibility in the SAP?

The proposed rules would provide that the evaluation and the rehabilitation may be provided by the employer, by an SAP under contract with the employer or by an SAP not affiliated with the employer. The choice of SAP would be made in accordance with employer/employee agreements and employer policies. In view of the "gatekeeper" function that the SAP has under the proposed rules, should the employer designate the SAP? Experts note that, due to training and the profession's normal employee orientation, the SAP may be eager to place the employee back into the normal work environment, *i.e.*, the safety-sensitive function, but reluctant to require testing by the employer. The SAP may prefer to conduct any necessary follow-up testing as part of an after-case or follow-up treatment program. While we recognize that placement of the employee back on the job without follow-up testing may help the employee, it could put public safety at risk. The SAP's customary loyalty to the employee client would directly conflict with the safety responsibility of the employer. In order for this program to work and to ensure public safety, the SAP must recognize his or her obligations to be responsive to the employer's need for a fair evaluation of the employee. Would a requirement that the employer designate the SAP lead to abuses, such as appointment of a relative who would charge twice the going rate? Should the Department's final rule impose a requirement on the use of SAPs to ensure adequate candor and objectivity?

The FRA's experience under its drug testing rules with required follow-up testing for employees who tested positive for prohibited drugs illustrates the need for a minimum number of required follow-up tests. In 1991, FRA conducted a compliance review on a large railroad company and found that 9 of 10 employees who had tested positive and were returned to service for up to one year had received no follow-up tests. One employee received one follow-up test six months after returning to work. One of the employees who had received no follow-up testing later tested positive on an FRA-required random drug test. The Department's Office of Inspector General (OIG) recently completed a review of the FRA's alcohol and drug program. The OIG reviewed follow-up testing practices on several railroads and found inconsistent procedures and a lack of follow-up tests. Its report recommends prescribing procedures for follow-up tests, including a minimum number of tests and a minimum period for follow-up testing. For the above stated reasons, we believe that we should require a minimum amount of follow-up testing.

Should the 0.04 alcohol concentration standard be used for follow-up tests? In view of the fact that these employees already have had an alcohol problem, should they be subject to a stricter 0.02 alcohol concentration standard, such as that imposed on return-to-duty tests? Would the costs and time lost in conducting these follow-up tests discourage employers from bringing employees back into safety-sensitive functions? What consequences should follow an employee's failure to "pass" a follow-up alcohol test? Would these consequences be different from those following failure to "pass" any other mandated alcohol test? Should follow-up testing be administered in a way similar to random testing (e.g., at or near the time the employee is performing a safety-sensitive function)? Given the potential for poly-drug misuse, should an employee who has "failed" an alcohol test automatically be subject to follow-up testing for drugs after being returned to safety-sensitive functions following alcohol misuse? For example, if the employee has "failed" an alcohol test (even if the employee has not also "failed" a drug test), should the employee be subject to six unannounced follow-up urine drug tests as well as six breath alcohol tests in the year following the employee's return to duty? How frequently does this problem occur? What additional costs would a requirement for follow-up drug tests following alcohol misuse incur? FRA currently has such a requirement in its locomotive certification regulations. (49 CFR 240.119(d).)

Retesting of Covered Employees with an Alcohol Concentration of 0.02 or Greater, But Less Than 0.04

The rules would provide that if the employer chooses to permit the employee to perform a safety-sensitive function within 8 hours following the administration of an OA-required alcohol test indicating an alcohol concentration of 0.02 or greater but less than 0.04, the employer must first retest the employee. The employee could return to the safety-sensitive function if the retest results in an alcohol concentration of less than 0.02. The FHWA proposal does not contain a retesting provision because of a

statutory requirement that drivers found to have a measurable amount of alcohol in their systems must be removed for 24 hours. Should this be an available option? Or should the employee be taken off the job for the full 8 hours? What logistical and economic consequences would the absence of the retest option cause? Should we be concerned about a possible "hangover" effect that an employee now below 0.02 after a session of hard drinking may be suffering? Would an enforced 8 hour absence take care of this concern?

Handling of Test Results, Record Retention, and Confidentiality

Retention of Records

To facilitate Department oversight of the alcohol testing program and to protect employee confidentiality, we propose to require each employer to maintain records of its alcohol misuse prevention program in a secure location with controlled access. Recordkeeping is necessary for effective enforcement of the regulations. It also would allow the Department to track progress in the programs and later make changes, if justified, that could reduce costs, ease implementation and enforcement, provide better employee protection, and/or increase benefits. The OA proposed rules would require employers to retain, for a minimum of five years, records of any employee alcohol test results indicating an alcohol concentration of 0.02 or greater; documentation of refusals to take required alcohol tests; equipment calibration documentation; and documentation of employee evaluation and referrals. They would require employers to retain for a minimum of two years any records related to the collection process (except equipment calibration documentation) and training. Records of negative test results would have to be retained for a minimum of one year.

Generally, the proposed rules would require each employer to maintain the following specific records:

(1) Records related to the collection process, including: collection logbooks, if used; documents relating to the random selection process; EBT equipment calibration documentation; verification of BAT training; documents generated in connection with decisions to administer reasonable suspicion and post-accident tests; and documents verifying existence of a medical explanation of an employee's inability to provide adequate breath for testing;

(2) Records related to test results, to the refusal of any covered employee to submit to a required alcohol test and to an employee dispute over the result of an alcohol test;

(3) Records related to other violations of these rules;

(4) Records related to evaluations and return to duty; and

(5) Records related to education and training.

Should documentation of reasonable suspicion determinations be required? If so, what kind?

Reporting of Results in a Management Information System

For oversight purposes, each employer would be required to submit to the Department OA that regulates it, at minimum, an annual report summarizing the results of its alcohol misuse prevention program for each calendar year. Employers subject to more than one DOT OA alcohol rule would have to identify each employee covered by the regulations of more than one OA and report the total number of such employees broken down by category of covered function. Before conducting any alcohol test on an employee regulated by more than one OA, the employer would have to determine which DOT OA rule or rules require the test and then identify such test results in the appropriate DOT OA reports. We note that the employer would provide aggregated not individual information under the MIS. The employer would be responsible for ensuring the accuracy and timeliness of each report submitted by it or a third-party service provider acting on the employers behalf. The employer would have to submit the annual reports no later than February 15 of each year for the preceding calendar year on the specified form. (The first reporting year may be different depending upon the effective date of the final rules.) Each report would contain a number of information items relevant to program evaluation or enforcement. Several of the OAs in other documents in today's **Federal Register** also are proposing a management information system for their drug testing rules. If those proposals are adopted, the alcohol and drug testing reporting requirements would be merged to permit one annual report and eliminate any duplicative information items.

Access to Facilities and Records

To preserve employee confidentiality, the proposed rules generally would prohibit employers from releasing information pertaining to an alcohol test of a covered employee or any violation of these rules, except as required by law. They would provide, however, that the employee is entitled, upon written request, to obtain copies of any records concerning the employee's use of alcohol, including alcohol test records. Employers must promptly provide any records requested by the employee, but could not make access to an employee's records contingent upon payment for records other than those specifically requested. The bundling of requested records with unrequested material at much higher cost has been a problem under the drug rules. Employers would have to release information as required by law, including court orders or subpoenae.

The proposed rules generally would require an employer to permit access to all facilities involved in its alcohol testing program and make available copies of all test results and any other alcohol program records, upon request, to the Secretary of Transportation or any OA with regulatory authority over the employer or any of its covered employees. In addition, upon request by the National Transportation Safety Board (NTSB) as part of an accident investigation, employers would be required to disclose information related to the employer's administration of a post-accident alcohol test following the accident under investigation.

Generally, the rules would require an employer to release information regarding an employee's records as directed by the specific, written consent of the employee authorizing release to an identified person. In view of the fact that these rules would permit employers to rely upon negative pre-employment alcohol tests conducted within the preceding six months, it specifically would require an employer, upon written request from the employee, to make records available to a subsequent employer. To preserve the employee's confidentiality, the identified person or recipient employer could not subsequently disclose the records, except as expressly authorized by the terms of the employee's written request.

It is likely that a prudent employer would ask an applicant to request this information from former covered employers, and not hire the applicant until satisfactory information had been received. The Department seeks comment, however, on whether it would be useful to require employers to require applicants to consent to obtaining this information from previous employers. In this approach, an employer would be prohibited from hiring an applicant for a safety-sensitive position if the applicant did not provide this consent. When a previous employer did not respond (*e.g.*, had gone out of business, could not be located, failed or refused to provide the requested

information), should the employer presume the employee's record as having been "clean" for that previous employer? How far back into the applicant's employment history should such a search go? Should the search apply only to tests mandated by DOT regulations? Would this approach produce significant delays in employers' ability to bring new workers on board? The Department seeks comment on these issues.

The rules would permit the employer to disclose information arising from the results of an alcohol test administered under these rules or from the employer's determination that the employee violated any prohibitions in these rules to the employee or in the context of a proceeding relating to an employee benefit, to DOT agency action against the employee (*e.g.*, an action to revoke a certificate), or to an NTSB safety investigation. The employer would also have to make information available to DOT offices having regulatory or review authority.

Consequences for Employees Engaging in Alcohol-Related Conduct

Removal From Safety-Sensitive Function

In general, the OA rules would prohibit a covered employee who has engaged in conduct prohibited by any of the OA rules from performing safety-sensitive functions until he or she has met the conditions for returning to such work. The rules would require employers, if they have determined that the employee has violated these rules, to ensure that the employee does not perform or continue to perform safety-sensitive functions. The rules, however, would prohibit the employer from taking any other action under these rules against an employee based solely on test results showing an alcohol concentration less than 0.04. The proposed rules would not prohibit an employer with authority independent of these rules from taking any other action.

Required Evaluation and Testing

Each OA NPRM would prohibit a covered employee from performing safety-sensitive functions following the employee's violation of an OA rule, unless the employee has been evaluated by a SAP, completed any requirements for rehabilitation, and "passed" a return-to-duty test with a result below 0.02.

The rules would provide an exception to the requirement for immediate removal and prohibition on return-to-duty without undergoing an evaluation; they would not prohibit the employee from temporarily continuing to perform safety-sensitive functions necessary to respond to an emergency, including responding to a situation that could result in an emergency or an imminent threat to public health and safety. For example, a truck driver who has violated the alcohol rules could continue to attempt to move a truck carrying hazardous materials if it were stuck on railroad tracks, a bridge, or on an exit ramp of a highway. The exception would not support the employee's continued performance of the safety-sensitive functions once safety is achieved or if a replacement employee is readily available.

Other Alcohol-Related Conduct

Although the Department is not proposing that alcohol concentrations below 0.04 constitute a violation of the rules, it is concerned about employees whose alcohol test indicates some alcohol in their system. As noted earlier in this preamble, an alcohol concentration of .039 may not warrant evaluation and rehabilitation but it may have an adverse effect on that individual's abilities. Alternatively, the individual's blood alcohol curve may be rising (*i.e.*, the individual may have just consumed enough to produce an alcohol concentration of 0.04 or greater, but the alcohol is just entering the bloodstream and, at the time of testing, the alcohol concentration is rising). Permitting such employees to continue performing safety-sensitive functions, even though there is knowledge of alcohol in their systems, would violate our and the employer's and employee's safety responsibility. Therefore, in addition to the 0.04 alcohol concentration prohibition, the rules would prohibit covered employees found to have an alcohol concentration of 0.02 or greater but less than 0.04 from performing or continuing to perform safety-sensitive functions. The employer could not permit the employee to perform or continue to perform such functions, until the employee's alcohol concentration drops below 0.02 or until the start of the employee's next regularly scheduled duty period, if it occurs at least eight hours following administration of the test. As discussed above, the rules would not prohibit the employee from temporarily continuing to perform safety-sensitive functions necessary to respond to an emergency, including a situation that could result in an emergency or an imminent threat to public health and safety, but they would not support continuance of the functions once the emergency has been averted.

If the employer wants to use the employee to perform safety-sensitive functions less than eight hours after the test, the employer must conduct a retest. When it falls below 0.02, the employee could be put back into a safety-sensitive function. If the retest result is above 0.04, the employee has violated the prohibition against having an alcohol concentration greater than 0.04. (Given the characteristics of alcohol metabolism, it is also likely that the employee would have violated the prohibitions on pre-duty or on-duty use.) The employee would then be required to meet the conditions for returning to safety-sensitive functions.

The OA NPRMs and the part 40 alcohol testing procedures would treat any indicated alcohol concentration reading of less than 0.02 on an evidential breath testing device (EBT) as "negative." Given the limits placed on the accuracy of measuring alcohol concentration in body fluids or breath, the rules use 0.02 as the threshold for establishing any measured alcohol concentration. Readings below 0.02, therefore, would have no significance for any purpose under our rules.

Use of Back Extrapolation

What should employers be required or permitted to do under the proposed regulations where the indicated breath alcohol concentration is 0.02 or greater, but less than 0.04, and enough time has passed since the performance of a safety sensitive function (*e.g.*, in a post-accident test) to raise questions about whether the alcohol concentration during the performance of the safety-sensitive functions (*e.g.*, at the time of the accident) was 0.04 or greater? The rules would require action only based on actual readings on the EBTs. They would not permit back extrapolation.

The employers' requirement to remove persons with indicated alcohol concentrations of 0.02 or greater and less than 0.04 from safety-sensitive functions for a period of not less than 8 hours or until they retest below 0.02 would achieve some of the goals of allowing back extrapolation. The Department seeks comment on the extent to which employers (and other fact finders) should be free to apply forensic principles to evaluate whether the individual may have used alcohol on the job or reported for the safety-sensitive functions with a prohibited alcohol concentration. The Department also seeks comment on whether, if employers conduct this kind of analysis, the results of back extrapolation should be allowed to have effect under the DOT alcohol testing program and visit upon the covered employee the consequences

of a DOT test result in that range. In the alternative, should the employer, as far as the DOT program is concerned, only be permitted to apply the consequences attaching to a result of 0.02 or greater but less than 0.04, but have the discretion, under its own authority, to take other action? Should the employer be prohibited from taking action against the employee based on a DOT-mandated test beyond actions required by the DOT rules?

The rationale for back extrapolation is based on studies that show that the average rate of elimination of alcohol from the bloodstream is around .015 per hour, though this rate may well decline at low concentrations (0.02 and below). Individuals' rates of alcohol elimination are very often not "average," however. Further, it is ordinarily not known when the individual last ingested alcohol or how much alcohol he or she consumed. All of these factors makes back extrapolation subject to substantial inaccuracy. Such analysis requires a number of "assumptions." Some of the assumptions relate to the individual subject (*e.g.*, whether there is healthy liver function; or the rate of elimination may be less than or greater than 0.015 per hour due to metabolic differences), some to facts or claims that may be supplied by the individual (no on-duty consumption, no consumption during the pre-duty abstinence period), and others to data that can be supplied by the employer (when the event occurred that triggered the test, when the test occurred). It is not only desirable but necessary for such analysis to be conducted by an expert in forensic toxicology. Such services may be in short supply. Therefore, we do not propose to permit back extrapolation of alcohol test results under these rules.

Alcohol Misuse Information, Training, and Referral

Employer Obligation to Promulgate a Policy on Alcohol Misuse

Each employer would have to provide educational materials that explain the requirements of these rules and the employer's policies and procedures with respect to meeting those requirements. Each employer also would have to provide written notice to every covered employee and to representatives of employee organizations concerning the availability of this information. Under the rules, the materials would have to include: the identity of a contact person knowledgeable about the materials; categories of employees subject to testing; what period of the workday or what functions would be covered by the rules; a description of prohibited conduct and the circumstances that would trigger testing; testing procedures; an explanation of what constitutes a refusal to submit to testing and the attendant consequences; and the consequences of violating the rules.

In addition to information on how the employer would implement the DOT program, the materials also may include the description of any self-identification program or procedure under which a covered employee may decline to perform or continue to perform safety-sensitive functions without penalty when he or she may be in violation of these rules, including any limits on the program. The employer also may include information on additional employer policies with respect to the use or possession of alcohol, including any consequences for an employee found to have a specified alcohol concentration, that are based on the employers authority independent of these rules. These additional policies must be clearly identified as based on the employers independent authority.

We believe motivating employees about safety in the workplace and good health is important to making an alcohol misuse prevention program work. Because the primary objective of any effective alcohol misuse program is deterrence rather than detection, it is especially important that, before any testing is begun, employers make their employees fully aware of the dangers of alcohol misuse in their jobs, advise them where help can be obtained if they have a problem with alcohol use, and the potential consequences for people who violate these rules. An effective company policy and educational effort can more than pay for itself with the benefits it can achieve. Should these rules require that employers give covered employees a minimum period of notice (e.g., 60 days) that the testing program is going into effect?

We recognize that it may be difficult to get the attention and support of workers by handing them literature or displaying various materials on a bulletin board. To illustrate this, a soon-to-be released safety study of the New York City Transit Authority (NYCTA) finds that merely distributing literature about NYCTA's substance abuse program without establishing an on-going substance abuse awareness program has not effectively communicated training information to employees. Generally, employees interviewed for the report could not remember receiving the distributed literature; the few who did remember it could not describe its purpose. What more effective means for educating employees and transmitting information about alcohol misuse prevention programs are available that would be economically feasible for employers? Should the OAs impose training requirements for non-supervisory employees? What additional costs would such requirements impose? What quantifiable benefits would they generate?

Training for Supervisors

Under the OA NPRMs, employers would have to ensure that persons designated to determine whether reasonable suspicion exists to require an alcohol test receive at least 60 minutes of training on the physical, behavioral, speech, and performance indicators of probable alcohol misuse. Would this amount of time be adequate? Is more extensive supervisor training necessary because of the need to require identification of symptoms associated with lower concentrations of alcohol? Since comparable training for drug use detection is required by the DOT drug testing rules, can this requirement be melded into that one to minimize costs to employers?

Referral, Evaluation, and Treatment

The Act requires that an opportunity for treatment be made available to covered employees. This does not require employers to provide or pay for rehabilitation or to hold a job open for an employee with or without salary; the costs of such a requirement could be prohibitive and could jeopardize this program. In the drug testing rules, the Department decided that it was inappropriate to establish a federal role in mandating that employers provide for rehabilitation and that it should be left for management/employee negotiation. The same logic would apply here and the Department has decided not to propose mandating employer-provided rehabilitation in these rules.

We encourage those employers who can afford to provide rehabilitation to do so through established health insurance programs, since it helps their employees, benefits morale, is often cost-effective and ultimately contributes to the success of both their business and their testing programs. However, repeated provision of access to rehabilitation services after "positive" testing, followed by repeated reinstatement and repeated violations may raise public safety and liability concerns for employers. Would it dilute the deterrent value of testing programs and encourage further misuse of alcohol or drugs?

To implement the statutory mandate, these proposed rules would require an

employer to advise a covered employee, who engages in conduct prohibited under these rules, of the available resources for evaluation and treatment of alcohol problems, including the names, addresses, and telephone numbers of SAPs and counseling and treatment programs. The employer would have no similar obligation to applicants who refuse to submit to or fail a pre-employment test; this obligation would run only to current employees. The rules would not prohibit an employer with independent authority from taking any other action otherwise consistent with law.

A SAP would evaluate each covered employee who violates these rules to determine whether the employee needs assistance resolving problems associated with alcohol misuse and refer the employee for any necessary treatment. Before returning to duty, each employee identified as needing assistance must (1) Be evaluated again by a SAP to determine whether the employee has successfully complied with the rehabilitation program prescribed following the initial evaluation, (2) Undergo an alcohol test with a result of less than 0.02 alcohol concentration, and (3) Be subject to a minimum of six (6) unannounced, follow-up alcohol tests over the following twelve (12) months. Compliance with the prescribed treatment and passing the alcohol test would not guarantee a right of reemployment; they would be preconditions the employee must meet in order to perform safety-sensitive functions. The decision on whether to return the employee to his or her job we would leave to the employer.

The proposed rules would provide that the evaluation and the rehabilitation may be provided by the employer, by a SAP under contract with the employer or by a SAP not affiliated with the employer. The choice of SAP and assignment of costs would be made in accordance with employer/employee agreements and employer policies. Is the requirement for an evaluation meaningful if we do not specify who should pay for the evaluation? What if both the employer and employee refuse to pay for the evaluation? Should the rules go further and prohibit an employer from taking any action under the rules against a covered employee unless the employee has been evaluated by a SAP or refused such an evaluation? Should a failure to pay constitute a refusal? What problems would this raise?

Since the determination made in alcohol tests required by these NPRMs is whether there is a prohibited concentration of alcohol in an individual's system, regardless of the source, we believe that there is no need to require a medical review officer (MRO) to interpret positive test results, as required by the DOT drug testing rules. There is no acceptable explanation for the prohibited alcohol concentration, so there is no role for an MRO. The mental health and/or medical professionals to whom the employee is referred for treatment can diagnose the disorder or disease, if any, associated with the alcohol misuse. A SAP would then determine whether the employee has complied with any rehabilitation requirements. The rules define the SAP to include a licensed physician (with a Medical Doctor or Doctor of Osteopathy degree) with knowledge of and clinical experience in the diagnosis and treatment of alcohol-related disorders (the degrees alone do not confer this knowledge), or a licensed or certified psychologist, social worker, or employee assistance professional with knowledge of and clinical experience in the diagnosis and treatment of alcohol-related disorders. In some OA rules, where the employee operates under a certificate or license, a licensed physician must certify, in conjunction with a medical examination, whether the employee can return to work.

Other Issues

As in the drug testing rules, we want to provide program flexibility to allow employers to carry out their programs in a more efficient, cost-effective manner and to ease the compliance burden on small businesses. Testing, for example, could be conducted by the employer, an outside contractor, a consortium, a union, or any other entity. The use of consortia has worked well in the drug testing area; in fact, it is the predominant method of compliance in some industries, particularly among smaller employers. We propose to delay implementation of the rules for smaller employers to enable them to join established consortia or large employer testing programs, rather than have to establish their own programs. The operating administrations have tried to make it easier for smaller employers; FRA proposes to retain its existing exemption from its drug and alcohol rules for railroads with 15 employees or less. (These entities are not considered sufficiently safety-sensitive to be subject to testing, since they tend to operate on private track at slow speeds.) FAA, which is proposing to require covered employers to submit plans for their alcohol misuse programs, would impose significantly reduced plan requirements on smaller employers. (FRA and FAA both propose plan submission, which is customary in conducting their programs; FTA proposes to require employer certification of compliance with the rules, which is customary in its programs.) What additional measures can we take to make it easier for smaller employers to comply with the rules?

Employers may find it more cost-effective and convenient to conduct alcohol testing at the same time they conduct drug testing. Because we are proposing to require alcohol testing at or near the time of performance, however, all random and reasonable suspicion drug testing also would have to occur at such times. For random testing, employers could easily accomplish this by randomly choosing the employee's number and then testing the employee the next time he or she performs safety-sensitive functions. What problems would be raised by combining the two programs?

Motor Carrier Safety Assistance Program (MCSAP Proposal)

Each OA also seeks public comment, especially from state and local governments, on the possibility of an alternative to requiring motor carrier, aviation, rail, mass transit and pipeline employers to conduct some or all alcohol testing, particularly post-accident and random testing. Specifically, we seek comments on whether the testing could be conducted under the FHWA Motor Carrier Safety Assistance Program (MCSAP), which is a Federal/State cost reimbursement and matching grant-in-aid program, or a similar program. Possible use of the MCSAP program for motor carrier testing is discussed in detail in the FHWA NPRM. The objective of MCSAP is to reduce the number and severity of accidents and hazardous materials incidents involving commercial motor vehicles. The MCSAP seeks to accomplish this by substantially increasing the level of nationally-uniform inspection and enforcement activities and the likelihood that safety defects, driver deficiencies, including alcohol misuse, and unsafe carrier practices will be detected and corrected. Currently, 48 States and four U.S. territories are actively participating in the MCSAP.

The statute requires the Secretary of Transportation to conduct a pilot program for the purpose of testing drivers on a random basis to determine if a driver has used alcohol or a controlled substance in violation of law or federal regulation. The pilot testing program is to be administered as part of the MCSAP and implemented in four states for a period of one year. At the completion of the pilot program, the

Department will issue a report of the program, including recommendations concerning the desirability and implementation of a MCSAP-administered random testing program. FHWA began the implementation of the required pilot project in Fiscal Year 1993.

In the MCSAP option presented in the FHWA NPRM, participating States would have to submit a random alcohol testing plan as part of their application for FHWA MCSAP funding. The random alcohol testing plan component would conform to the requirements of these rules.

Recognizing that some statutory changes to implement the MCSAP option may be necessary, we seek public comment on whether involving State and local authorities in alcohol testing would work. It could be accomplished at three different levels of involvement. First, the FHWA NPRM's MCSAP option would substitute post-accident and random testing by local officials for motor carrier based testing. Would this save costs? Since States already have some equipment and their officials are already trained in using that equipment, overall costs may be less. As neutral, third-party testers, their tests may be better accepted by employees. Due to the fact that local officials may reach an accident first, they can help in determining who was involved in the accident.

The second would involve extending this option to covered safety-sensitive employees from the other transportation industries issuing proposed rules today. Could the program be adapted so that employees regulated by other OAs, such as RSPA and FAA, could be included?

The third would allow substitution of local official testing for all types of testing required by these rules (*i.e.*, pre-employment and reasonable suspicion in addition to random and post-accident). Would this be useful? Employers could send employees needing testing to a local State testing facility or the State could come to the employer upon request, since it may have mobile vans for this purpose.

Because the expenses of such a program would lessen the resources available for other MCSAP programs, user fees may be necessary for such an alternative to be possible. Would it be feasible to impose user fees for such a system? As noted above, costs may be less under such a program, so even if all employers were assessed a user fee, their overall costs would be much less than if they had to conduct their own testing. Do employers think such an option is feasible and would result in lower costs for them if available? Since some States use blood tests upon a testee's request for confirmation, we also seek comment on whether blood tests conducted by state officials should be acceptable for the purposes of these proposed rules, because such tests must meet standards that would already make them acceptable in court.

Multi-Agency Coverage

In some transportation industries, a significant percentage of employees are subject to the testing rules of more than one DOT OA; some are subject to the testing rules of more than one federal agency (*e.g.*, employee drivers covered by the Department of Energy may also be covered by FHWA). This is one reason we have tried to make the DOT OA proposals as uniform as possible. Generally, where it would not compromise the effectiveness of the testing program or other requirements, one DOT agency would defer to another or recognize the validity of the other's requirements.

There are different situations in which multi-agency coverage can occur:

(1) An employee may perform different modal functions for the same employer. For example, an employee may act as both a pipeline inspector and a truck driver for a single employer, activities regulated by the RSPA and the FHWA, respectively. Such an employee could be in a single random pool under the proposed rules, but would have to have an equal chance of being selected for random testing while performing either pipeline inspection or driving functions.

(2) An employee may have two employers. For example, an employee may fly for one employer and drive for another. That employee would be subject to two random testing requirements and would generally be in two different pools. As discussed above, however, the employee could be covered by one random testing pool, *e.g.*, one run by a consortium; in both situations, the employee would be subject to random testing in either job.

The rules would require that employees cease safety-sensitive functions in every mode of transportation, once determined to be in violation of any one of the OA rules. We note that the Act also prohibits the performance of safety-sensitive functions in the aviation, rail, motor carrier, or mass transit industries by an employee who has used alcohol in violation of any law or any federal regulation.

We also have been consulting with other federal agencies during this rulemaking proceeding in an attempt to make Federal government rules as consistent as possible. The Department of Energy (DOE) already has issued a similar proposed rule on alcohol misuse for employees in nuclear facilities. At this early stage, we are not aware of any serious programmatic differences with our rulemakings. However, to avoid any potential conflict, DOE officials have indicated that they plan to defer to the DOT rules where there are entities covered by both programs. We seek comment on any other problems caused by multi-agency coverage and potential solutions.

Impairment Testing

In the ANPRM, we discussed the possible use of impairment testing, such as ignition interlock devices (IIDs) that prohibit operation of a vehicle if the driver does not pass the test. These are being required in some states in passenger vehicles used by persons convicted of driving under the influence. Such devices, which use breath test components, are costly and relatively easy to circumvent (*e.g.*, another person could operate or blow into the device). Other devices exist that purport to measure impairment. These include the critical tracking tester (CTT), the Tracometer (which requires a driver to align a pointer on a moving target), computer devices, and simulators. The use of some devices that measure certain performance decrements would require the employer to run baseline tests on each employee for comparison with the results. These devices may need further validation before a practical device is available for use at the workplace to achieve the objectives of the proposed alcohol testing regulations. Moreover, these devices measure performance decrement, which can be caused by many things other than alcohol or illegal drug use.

It makes good sense to remove employees impaired for any reason from safety-sensitive positions, and these rules do not prohibit any employer from doing so under his or her own authority. However, the Act requires that the covered OAs require testing for alcohol concentration, not impairment. Indeed, the Act specifically requires that the devices used for confirmation testing be capable of providing quantitative data regarding alcohol by a scientifically recognized method. Even if performance testing devices could be accurate as screening devices, if employers then had to confirm positive results with an EBT, these costs would be much higher than if they used an EBT with both tests. Therefore, the OAs have not proposed anything other than breath alcohol testing in these rules. As noted earlier,

the Department intends in the future to seek comment on the scientific, technological, and legal status of these "performance testing" devices in a separate notice.

Self-Identification/Peer-Referral Programs

Since our primary purpose is to keep employees who have alcohol in their systems from performing safety-sensitive functions, employees should be able to identify themselves as unfit to work. We would like to encourage employers to establish self-identification or peer-referral programs and encourage employees to use them. These programs, which already exist in some segments of the transportation industry, allow an employee to decline without penalty to perform or continue to perform his or her job if the employee knows that he or she is or may be impaired by alcohol. We do not propose to require self-identification programs, because we believe that they are a matter more appropriate for collective bargaining. The successful implementation of such programs depends upon joint labor-management commitment to an alcohol/drug-free work environment.

None of the proposed rules would prohibit employers from establishing or continuing a self-identification program or procedure under which a covered employee is permitted to decline to perform safety-sensitive functions when the employee may be in violation of an alcohol prohibition. However, the program could not interfere with the conduct of the alcohol tests required by these rules. Such a program could permit a covered employee to take a voluntary alcohol test to determine whether the employee is in violation of these rules; there would be no Federal consequences or requirements pertaining to the test or its results, however, since the test would not be required by DOT rules.

Employers and employees must address some important questions if they set up such programs. For example, should employees be allowed to self-identify after they have reported for duty? What should happen to employees referred by co-workers? They might be in violation of these rules by having a prohibited concentration of alcohol in their body while they are performing safety-sensitive functions. Should an undetected person be allowed off the job as quickly as possible no matter when he/she self-reports? What would best enhance safety?

The proposed rules would not interfere with an employer's unfettered discretion to impose its own sanctions against self-identifying employees, so long as the sanctions are not premised on our rules.

Education

In conjunction with the implementation of the proposed rules, the Department would distribute educational materials and conduct seminars designed to increase employee awareness of the risks of alcohol misuse by those who perform safety-sensitive functions. The Department took similar action in the drug area. There is some disagreement about the respective effectiveness of education vis-a-vis enforcement. Some researchers claim that education is more effective in preventing alcohol misuse than apprehension of the abuser. The American Automobile Association Foundation for Traffic Safety compared eight states that adopted tougher drunk driving laws with six that did not. The new laws had no effect at all on traffic fatalities. The Foundation attributes the overall decline in U.S. traffic-related deaths between 1980 and 1985 to public awareness campaigns by such groups as Mothers Against Drunk Driving (MADD). A Boston University researcher similarly concluded that social pressure and publicity "may be as important as government regulations in reducing drunk driving and fatal crashes." (Both quoted in "USA Today", Wednesday, August 3, 1988.)

These studies have been criticized as poorly designed and misleading, since education programs were never isolated as an independent variable for comparison. NHTSA believes that the most effective programs are those that combine education and enforcement. Public information and education programs, in the absence of enforcement activities or sanctions, have never been shown to have an impact on alcohol-related fatal crashes. Conversely, scores of studies have found that programs involving enhanced enforcement, roadside sobriety checkpoints, and the use of sanctions such as license suspensions frequently have resulted in significant reductions of alcohol-related fatalities. Although there is disagreement on the effectiveness of education alone, it appears that using education as an adjunct to deterrent measures would make both more effective. What more can the Department do to increase educational efforts about the misuse of alcohol?

International Issues

The Act mandates that the requirements for pre-employment, reasonable suspicion, random and post-accident tests for alcohol (and drugs) be applied to foreign operators in the aviation, rail and motor carrier industries to the extent those requirements are consistent with our international obligations. We must also "take into consideration any applicable laws and regulations of foreign countries." Because of the many questions raised about the implementation of this statutory mandate, we have decided that the best approach is to issue advance notices of proposed rulemaking on these issues. The FRA, FHWA, and FAA ANPRMs on international issues are published elsewhere in today's Federal Register.

Regulatory Analyses and Notices

General

Each of the OA preambles separately addresses a number of administrative matters concerning compliance with administrative requirements in statutes, executive orders and Departmental policies and procedures. Readers should refer to the individual OA NPRMs for statements specific to each NPRM.

Appendix A to Common Preamble—Bibliography

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Common Preamble for the Proposed Alcohol Misuse Prevention Rules.

Issued on December 2, 1992 in Washington, DC.

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Secretary of Transportation.

Thomas C. Richards,

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Administrator, Federal Highway Administration.

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[FR Doc. 92–29673 Filed 12–10–92; 10:00 am]

BILLING CODE 4910–62–M

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 40

[Docket 48513; RIN 2105–AB95]

Procedures for Transportation Workplace Drug and Alcohol Testing Programs

AGENCY: Office of the Secretary, DOT.

ACTION: Proposed rule.

SUMMARY: Under the Omnibus Transportation Employee Testing Act of 1991, the Department of Transportation is required to implement alcohol testing programs in various transportation industries. This rule proposes uniform testing procedures that would be used by all Department of Transportation agencies conducting alcohol testing programs of the kind mandated by the Act. The statute also requires certain changes in the Department's drug testing procedures, which this rule proposes to implement. The Department is also proposing a Management Information System (MIS) to gather evaluation and enforcement information for the Department's drug and alcohol testing programs.

DATES: Comments must be received on or before April 14, 1993.

ADDRESSES: Comments should be sent to Docket Clerk, Att: Docket No. 48513, Department of Transportation, 400 7th Street, SW., room 4107, Washington DC, 20590. For the convenience of persons wishing to review the docket, it is requested that comments be sent in duplicate. Persons wishing their comments to be acknowledged should enclose a stamped, self-addressed postcard with their comment. The docket clerk will date stamp the postcard and return it to the sender. Comments may be reviewed at the above address from 9 a.m. through 5:30 p.m. Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, Department of Transportation, 400 7th Street, SW., room 10424, Washington DC., 20590, 202–366–9306; or Donna Smith, Department of Transportation Office of Drug Enforcement and Program Compliance, same street address, room 9404, 202–366–3784.

SUPPLEMENTARY INFORMATION:

Background

The Omnibus Transportation Employee Testing Act of 1991, enacted October 28, 1991, directed significant changes in the Department of Transportation's substance abuse-related programs for most transportation industries that the Department regulates. First, the Act directed the Federal Transit Administration (FTA) to promulgate a drug testing regulation for the transit industry. A previous FTA drug testing rule had been enjoined by the Federal courts on the basis of insufficient statutory authority. The Act also widened the Federal Highway Administration (FHWA) drug testing program to include some intrastate as well as interstate drivers for motor carriers.

Second, the Act required some changes in the Department's existing drug testing procedural rule. The most important of these changes was a requirement for using the "split sample" approach to testing in the programs covered by the Act, which Congress believed would provide an additional safeguard for employees.

Third, the Act required the Department to establish alcohol testing programs for the aviation, railroad, motor carrier, and transit industries. In response, the Department's operating administrations (the Federal Aviation Administration, Federal Railroad Administration, Federal Highway Administration, and Federal Transit Administration) are each today proposing an alcohol testing rule for its regulated industry. The Research and Special Programs Administration, for the pipeline industry, is proposing a similar regulation, in order to ensure parallel coverage for the Department's alcohol and drug testing regulations. The latter proposal is being issued under the existing RSPA safety regulatory authority. The Coast Guard is not proposing to change its existing alcohol testing regulations (33 CFR part 95 and 46 CFR part 4). The Department of Transportation has carefully coordinated the five proposed industry regulations, in order to provide substantive consistency and common language. Only where industry-specific differences can be justified as essential do the proposals differ from one another.

The Department's drug testing procedures, 49 CFR part 40, have governed drug testing under all operating administration drug testing rules. This proposal extends the same organization to alcohol testing for the five modes affected. Under the proposal, the existing drug testing procedures would become a separate subpart of the regulation, and a new subpart containing the alcohol testing procedures would be added.

Finally, the Department is proposing management information system (MIS) requirements for the Department's drug and alcohol testing requirements. The basic, Department-wide MIS provisions for drug and alcohol testing are proposed in part 40; separate modal drug MIS NPRMs and MIS provisions of the modal alcohol NPRMs apply these requirements to particular industries.

Having all the Department's uniform drug and alcohol testing procedures, as well as MIS provisions, in a single

regulation will simplify compliance for covered parties and avoid confusion by permitting all parties to look to one source for information on these issues. This should be particularly helpful to those employers who have employees covered by more than one DOT operating administration rule. However, employers regulated by the Coast Guard would continue to refer to 33 CFR part 95 and 46 CFR part 4.

Subpart A—General

Section 40.1 Applicability

This section would be revised to more accurately state the relationship between part 40 and operating administration rules. The operating administration drug and alcohol testing rules and part 40 are all manifestations of the Secretary's authority to regulate transportation industries in the interest of safety. Part 40 governs the activities of transportation employers not directly, but through the medium of the operating administration regulations, which direct the respective covered employers to conduct their tests according to part 40. As noted above, the Coast Guard has retained its existing alcohol tests rules. For this reason, while part 40 drug testing procedures apply to testing of employees covered by Coast Guard drug testing rules, part 40 alcohol testing procedures would not apply to employees covered by existing Coast Guard alcohol testing rules.

Applying the alcohol and drug testing procedural requirements to regulated parties through the regulations of the operating administrations is key because each operating administration has responsibility to implement the alcohol and drug testing programs for the mode of transportation it regulates. Oversight, administration and enforcement will be done by an operating administration for the employers it regulates. For example, an air carrier covered under the FAA's alcohol testing rule that failed to comply with a procedural requirement of part 40 would be violating the FAA's regulatory requirement that the air carrier use part 40 procedures. The FAA would use its existing enforcement procedures and would have authority to assess civil penalties and take certificate action, as appropriate.

In any regulatory program involving several different Department of Transportation agencies, coordination and consistency in the application and interpretation of regulatory provisions are essential. With two exceptions (the Coast Guard alcohol testing program and the FRA post-accident toxicology program), part 40 controls all the Department's drug and alcohol testing programs. This uniform regulatory language must be interpreted consistently. A provision cannot mean one thing in the railroad industry, something different in the transit industry, and a third thing in the aviation industry. Consequently, the Department has made a commitment to establish, before the issuance of a final rule, an internal coordination process that will ensure that formal interpretations of part 40 and guidance material developed for general distribution would be reviewed and receive DOT concurrence to ensure that they are valid on a Department-wide basis. The Department seeks comment on the most appropriate means through which regulated parties could learn that interpretations or guidance had been coordinated in this way. This could be particularly useful for employers with employees subject to more than one operating administration rule.

In creating this mechanism, the Department would ensure that it did not prevent operating administration personnel from answering questions, offering informal guidance or pursuing enforcement actions. But to maintain the essential Department-wide consistency—the absence of which would impose a significant, unnecessary burden on the regulated industries and on employees subject to testing—the Department strongly believes that a coordination mechanism of this kind must be established.

A related issue concerns the possibility of differences, or real or perceived conflicts, between part 40 and operating administration rules. The operating administration rules all would require employers to follow part 40 procedures. However, are there any provisions of any operating administration rules that might be viewed as inconsistent with the mandate to use part 40 procedures?

For example, under existing part 40 drug testing rules, an MRO must grant a retest if the employee asks for the retest within 72 hours of learning of a positive result. Some modal rules allow up to 60 days for such a request. The Department received questions about how the provisions related to each other. (We said that since a request received within 72 hours was clearly a request received within 60 days, there was no conflict between the provisions.)

The part 40 NPRM explicitly addresses this question, but there may be similar issues between the proposed part 40 alcohol testing procedures and the operating administrations' proposed alcohol testing rules. We ask commenters to point out any potential problems of this kind to us. It is the Department's objective to eliminate or clarify any such perceived inconsistencies. We also seek comment on any mechanisms or rules of construction commenters think would be appropriate to resolve any problems of this kind that may occur after final rules are published.

Although implementation of part 40 generally would be done through an operating administration, part 40 is an Office of the Secretary of Transportation (OST) regulation. As such, requests for exemption would be processed under 49 CFR part 5, an existing regulation covering requests for exemption from or amendment to all OST rules, rather than through separate operating administration exemption procedures. This would add an additional element of consistency. This approach is consistent with the existing part 40 drug testing procedures, from which exemptions would also be granted under part 40 (See 54 FR 49863; December 1, 1989).

The grant of an exemption under part 40 must be based on special or exceptional circumstances. It is not appropriate to carve out a generally applicable exception to a rule. Also, an exemption must be based on circumstances not contemplated as part of the rulemaking. The exemption process is not designed to revisit issues settled in the rulemaking process.

Section 40.1 would also emphasize that other parties involved in the testing process—such as consortia, contractors, and agents—"stand in the shoes" of the employer. They are, therefore, subject to the same obligations and requirements as the employer. If an employer is required to do something, so is the consortium that is conducting testing for the employer. If the consortium fails to do something correctly, the employer is in noncompliance.

The Department seeks comment on how best to resolve one problem that we have noted in administering the drug testing rules. In some cases where an employee has tested positive for drug use, the employee has sought review of a subsequent personnel action in an available forum. In some cases, the decisionmaker in that forum has decided that the test was procedurally invalid and ordered relief (*e.g.*, reinstatement). Employers have been uncertain about whether such a determination overrides the employer's obligation to comply with DOT drug testing rules.

This problem could arise in a number of ways. For example, suppose an employee tests positive. The employer discharges the employee, who files a grievance as provided in a labor-

management agreement. An arbitrator decides that the test was invalid because of something part 40 does not regard as a "fatal flaw" (e.g., the collector failed to note on the custody and control form that the specimen temperature had been taken) or on the basis of evidence not provided for in part 40 (e.g., a test of a urine sample in a laboratory not certified by the Department of Health and Human Services (DHHS)). The arbitrator orders the employee reinstated. DOT rules prohibit the employer from allowing an employee who has tested positive from performing a safety sensitive function without going through the steps provided in DOT rules (e.g., evaluation by a substance abuse professional (SAP), passing a return-to-duty test, being subject to follow-up testing). Does the arbitrator's decision authorize (or obligate) the employer to return the employee to safety-sensitive duties without complying with these regulatory provisions? Should this question be answered differently in situations in which other decisionmakers (e.g., the National Transportation Safety Board in an FAA certificate case, a court) or other fact situations (e.g., a disputed determination that there was a "fatal flaw" in the testing process or a determination that a combination of lesser flaws was sufficient to invalidate a test) are involved.

One important consideration in answering this question, at least in the arbitration context, is that requirements of the DOT drug and alcohol testing rules are based on Federal safety law. It is well established that labor and management cannot agree to establish testing requirements for covered employees that are inconsistent with Federal rules. It seems unlikely that an arbitrator appointed under the authority of a labor-management agreement could, by ordering a result which is contrary to DOT rules, obviate the employer's duty to comply. But how would the employer know what its obligations were in a specific case? Would there need to be a DOT advisory or decisional mechanism established to provide this information to employers?

Section 40.3 Definitions

This section contains definitions applying to both drug and alcohol testing. Definitions specific to drug or alcohol testing would be found in §§ 40.41 and 40.75, respectively.

Subpart B—Drug Testing

Section 40.25 Specimen Collection Procedures

The Act requires the split sample method to be used for drug tests under the FTA, FRA, FHWA, and FAA rules. By the "split sample" method, the Act means a procedure in which urine specimens obtained for drug testing are subdivided into two containers and processed as two specimens. This procedure makes a second, sealed specimen available for testing at a second DHHS-certified laboratory if the test of the first specimen is "positive."

The existing rule spells out a split sample procedure, but makes it an employer's option. Reflecting the statute, the proposed rule would mandate the use of this procedure for the four operating administrations that the Act covers. Since the Act does not cover RSPA or the Coast Guard, the use of split samples will remain optional for employers whose employees are subject only to these two rules.

The Department proposes that the primary and split samples, with accompanying paperwork, would flow from the collection site to the DHHS-approved laboratory used for the test of the primary sample. What happens to the "split" is described under § 40.29.

The Department understands that the National Institute on Drug Abuse (NIDA) is currently considering reducing the urine specimen volume for a primary or single test from 60 to 30 ml. This amount, in our view, is sufficient to allow for all testing called for under part 40 procedures. The Department consequently endorses this proposed change, which would also be important in operating a split sample system successfully. Under the proposed split sample procedure, the primary sample, therefore, would be 30 ml, with an additional 15 ml collected for the "split." The minimum sample volume, which the collection site person would ask the employee to provide, would be 45 ml for the split samples procedure and 30 ml in the single sample procedure.

Under the existing rule, there have been a number of problems with employees being unable to provide a 60 ml sample. The proposed change should mitigate this problem. The Department also seeks comment on whether the change from a 60 ml to a 30 ml sample (45 ml in the case of a split sample) would pose significant problems for laboratories, in terms of their being able to have sufficient urine for initial testing, confirmation testing, and reanalysis.

For split samples, the proposal envisions the donor providing the entire 45 ml sample in a single collection container. The collection site person would then pour the urine into two separate specimen bottles for shipment to the laboratory. The proposal would permit a variation on this procedure in emergency or unusual circumstances (e.g., a post-accident test at a remote location where the normal testing kit was not available). In this situation, the employee could urinate into one container, with a portion being poured into a second. Both would be processed and sent to the laboratory. The Department seeks comments on whether this variation is advisable and on any other collection methods that might be workable for split samples.

If the employee could not produce a 45 ml sample, the employer would direct the employee to drink up to 24 ounces of fluid in a period of up to two hours. This is a modification of the current "shy bladder" procedures designed to avoid any possibility of side effects from drinking too much water.

Section 40.29 Laboratory Analysis Procedures

In view of the statutory requirement for split samples under four of the Department's drug testing rules, procedures for laboratory handling of split samples are set forth in greater detail than in the present rule. The split sample would be logged in and stored securely, with the seal remaining intact. If the test of the primary specimen were negative, the laboratory would dump the split sample. If the test of the primary sample is confirmed positive, the lab would continue to hold the split specimen for a year (or longer if a legal challenge were pending) to ensure that it remained available for a second test. If the employee requested a test of the split specimen (through the medical review officer (MRO)), the first laboratory would ship the unopened split sample to a second DHHS-approved laboratory for testing. If the test of the split sample fails to confirm the presence of drug(s), then the entire test would be canceled.

Section 40.33 Reporting and Review of Results

Paragraphs (e) and (f), which deal with the reanalysis of specimens, would be amended in light of the mandatory use of split samples under four of the Department's drug testing programs. Under paragraph (e), where the single sample method of collection is used, the MRO would, if the employee asked within 72 hours of learning of a verified positive test, order a reanalysis of the

specimen. If the reanalysis were negative at the level of detection (*i.e.*, showed no presence of the drugs for which the sample originally tested positive), the test would be canceled. This is the same procedure as is followed under the existing rule. The difference is that the right of the employee to obtain a reanalysis of the primary specimen would not be available in cases where the split sample method of collection is used. The Department believes that the right to have a split sample tested sufficiently protects employees, and that having both a reanalysis of the original specimen and a test of the split specimen available would be unnecessarily duplicative and costly.

Paragraph (f) proposes a similar procedure with respect to split samples. As with reanalysis, testing of the split sample would only be for the presence of drugs for which the primary sample had tested positive. Under this procedure, if the split sample had been lost, or sufficient urine for testing were unavailable, the test would be canceled, since the statute creates a right to having the split sample tested.

The 72-hour notice window is the same time frame found in the existing part 40. Some operating administration regulations, however, provide that a request may be honored as long as 60 days from the date the employee learns of a positive test result. The Department seeks comment on whether a period longer than 72 hours is needed, and, if so, what that period should be (*e.g.*, a week, 10 days, 30 days, 60 days).

Section 40.41 Definitions

This is a new section, separating out those definitions pertaining only to drug testing from other definitions in part 40. There is a new definition of "canceled test." As the definition explains, a canceled test is neither positive nor negative, just invalid. The term includes a sample which has been rejected by the laboratory.

Subpart C—Alcohol Testing

This subpart sets forth the alcohol testing procedures that all transportation employers covered by the FAA, FHWA, FRA, FTA, and RSPA alcohol testing rules would implement. These uniform procedures are intended to ensure consistency in the administration of alcohol testing nationwide, whether an employer is an airline based in Atlanta or a small motor carrier in Oregon.

Persons familiar with the Department's drug testing rules will notice some similarities between those rules and the proposed alcohol testing procedures. The Department is proposing rules concerning the collection site and the collection site person (called the "breath alcohol technician" (BAT) and the "alcohol testing site," respectively, in the alcohol testing procedures), a testing form, preparation for and administration of initial and confirmatory tests, confidentiality, safeguarding, test records, what to do if an employee cannot provide an adequate amount of breath, and what errors in the process are "fatal flaws" that invalidate a test. Except for the "fatal flaws" section, all these provisions have parallels in the drug testing procedures.

The differences between this subpart and the drug testing procedures are equally noteworthy. The drug testing procedures call for the donation of a quantity of urine, its packaging, transmission to a NIDA certified laboratory for testing, and the use of an evidentiary chain of custody. A medical review officer is used to interpret lab results, so as not to label someone who has legitimately ingested a substance as an illegal drug user .

The alcohol testing procedures would use breath for purposes of determining the alcohol concentration as measured by a breath testing device that provides a definitive, quantitative result at the alcohol testing site. Therefore, packaging, chain of custody, and transmission rules are not needed. No testing laboratories would be involved, and therefore there would be no need for laboratory certification or procedure rules. Because the issue to be determined is whether an impermissible quantity of a legal substance (ethyl alcohol) is in the person's system—whether it comes from use of an alcoholic beverage or medication—a medical review officer to interpret the results would not be needed. The result is that these alcohol testing procedures would be shorter and less complex than the drug testing procedures.

As the foregoing discussion suggests, perhaps the most important decision underlying these proposed procedures is to rely exclusively on breath testing, rather than involving testing of blood, saliva, hair, or urine specimens, or evaluations of motor or cognitive functions as part of the process. After careful consideration of the scientific, economic, practical and legal issues involved, the Department believes that the choice of breath testing is consistent with its commitment to an accurate and fair testing program.

Analysis of breath for alcohol (specifically ethanol) has been practiced for many years, both in the clinical diagnosis of intoxication and for traffic law enforcement purposes. In light of the use of breath test devices for law enforcement purposes, the National Highway Traffic Safety Administration (NHTSA) developed Guideline Specifications (49 FR 48855; December 14, 1984) to ensure that the equipment meets certain minimum performance specifications.

Instruments meeting the NHTSA specifications are included in a "Conforming Products List of Evidential Breath Testing Devices" (CPL), which is used in the purchase of instruments for law enforcement purposes. Instruments on this list enjoy wide acceptance in the judicial community and have met court scrutiny for precision and accuracy. These instruments are reliable in measuring an accurate alcohol concentration from breath, as long as the operator is appropriately trained and the instrument maintained in accordance with the manufacturer's guidelines.

The precision and accuracy of the instruments, combined with their judicial acceptance, make breath testing instruments of evidential quality the most appropriate method to use in testing for alcohol misuse in the transportation industries covered by the proposed regulations of the five affected DOT agencies. Breath tests provide an immediate result. Results are obtained nearer to the time at issue than is possible with blood testing. This is a significant advantage in that it enables an employer to remove an employee who tests positive from performing safety-sensitive duties quickly.

Chain of custody issues that would arise with blood testing do not arise in breath testing. The needs for special collection facilities, certified testing laboratories, and the use of medically trained personnel would not be present in breath, as opposed to blood, testing. The operating cost per test is also lower. Breath tests are much less intrusive than blood tests, from the employee's point of view.

Also, properly conducted breath tests can accurately reflect the alcohol content of the pulmonary arterial blood which, in the initial or absorption phase of alcohol assimilation, gives a truer picture of alcohol influence on the central nervous system than a venous blood sample. In the post-absorptive phase, a quantitative breath test result will yield comparable results to blood analysis (arterial or venous).

This is not to say that blood testing is not a legally valid means of establishing alcohol concentration, on the basis of which it is appropriate to take action with respect to an employee. For example, existing Coast Guard alcohol testing regulations provide for post-

accident alcohol blood tests in some situations. The validity of these procedures which are subject to evidentiary hearings, has long been recognized in administrative and court proceedings, and it is not brought into question by the Department's proposal to use breath testing in other contexts.

The Department is aware of a number of other methods of testing for the presence of alcohol that are being marketed or developed (*e.g.*, measuring alcohol content in saliva or eye vapors). As other technologies become available, the Department is willing to consider the possibility of their use in its alcohol testing program. The Department would evaluate the merits of such testing methods or devices with respect to such factors as their accuracy and reliability under field conditions, acceptability as evidential devices, intrusiveness, ability to provide a result and a printed record of a result promptly, and cost.

At the present time, the Department believes that, viewed against these criteria, none of the alternative testing methods of which we are aware is now appropriate for use under the Department's regulations. While there may be promising techniques under development that ultimately could meet all the Department's criteria, they are not sufficiently developed at this time to warrant inclusion in this rule.

With respect to screening devices i.e., devices which do not use a scientifically recognized method to establish a quantified alcohol concentration), some are less accurate and would record false positives and/or false negatives (especially at lower alcohol concentrations). It would be difficult to establish that the initial tests had been conducted to establish compliance with the rules because the screening devices could not provide the same type of records as EBTs. Nevertheless, the Department seeks comment on whether non-evidential screening devices should be permitted in some contexts (*e.g.*, in an airport, to perform initial tests of air crew personnel at the gate, with an EBT available at a central location to perform confirmation tests of airline employees who tested positive on the screen within 15 minutes). If screening devices were to be allowed, other procedural requirements of part 40 and the modal rules may have to be changed. For example, since screening devices cannot record a sequential number and result of the initial test, what other records would be needed for this purpose?

We view the proposed testing method and testing device requirements as performance standards. If, in the future, the current drawbacks of other testing methods are resolved or the needed capabilities are developed for other testing methods, we will consider permitting their use for alcohol testing under the Department's rules. For further discussion of testing methods, readers are referred to the relevant discussion in the common preamble.

Section 40.51 The Breath Alcohol Technician (BAT)

To ensure that tests are conducted properly and accurately, each BAT would have to be trained to proficiency in the use of the particular EBT he or she would operate and in following properly the procedures in this Part. The NPRM proposes that the training would have to cover several elements, including operation and methodology of the breath testing instrument, the specific procedures of this rule, and, where needed, performing checks of external calibration on the EBT. The Department seeks comment on whether it would be cost-effective to include additional elements in BAT training (*e.g.*, concerning the pharmacology and physiology of alcohol).

To ensure that the BAT is trained to proficiency, the NPRM would require that each course of instruction contain a "hands on" or practical application component that clearly demonstrates the BAT's ability to properly use the EBT to produce an accurate result, in accordance with the procedures outlined in this rule. If the BAT is also going to perform checks of external calibration of the EBT, proficiency in doing so would also have to be demonstrated. The employer would maintain records of BAT training and proficiency. The rule further proposes that courses of instruction consistent with the NHTSA model course for EBT operator training, or other state-approved courses for breath testing device operators may be used to meet the training requirement. The Department seeks comment on whether there should be a minimum number of hours required for such training.

The NPRM proposes that a direct supervisor of the employee being tested could not, in ordinary circumstances, be the BAT, in order to avoid any appearance of bias. However, if it is impracticable for anyone else to do the job, the supervisor could do so, where not prohibited by operating administration rules (*e.g.*, with respect to reasonable suspicion tests). The Department seeks comment on whether the discretion to use a supervisor as a BAT should be further limited (*e.g.*, by absolutely prohibiting the use of a supervisor except in the case of post-accident testing). The Department also seeks comment on whether, if a person other than a BAT conducts a test in unusual circumstances (*e.g.*, a law enforcement officer who arrives at the scene of an accident before the employer's BAT), the result may be used under the Department's rules.

One issue that has occurred to the Department is that it would adversely affect the perception of the integrity of the process, and perhaps the defensibility of individual tests, if the BAT were intoxicated at the time of testing or had been seen consuming alcohol prior to conducting tests. Consequently, the Department seeks comments on whether this section should include a provision to address this concern (*e.g.*, a requirement that the BAT be alcohol-free while on duty, a pre-duty abstinence requirement for BATs, and/or a requirement that a BAT pass an alcohol test before testing others). If there were such a requirement, what should the consequences of violation be and how could the requirement be enforced?

Section 40.53 Devices To Be Used in Alcohol Testing

The Department proposes that evidential breath testing devices (EBTs) used in meeting the requirements of this rule would have to be listed on the Conforming Products List (CPL) published periodically by NHTSA. The CPL is published in the **Federal Register** and updated periodically as new technology and changes to breath testing instruments warrant. For many years, NHTSA has evaluated and field tested breath testing devices for their technical and scientific capabilities for use in law enforcement as evidential tests of breath alcohol content. By inclusion on the NHTSA CPL, a given model of breath testing device is certified as providing accurate and reliable results. In addition to being listed on the NHTSA CPL, EBTs used to meet the requirements of this rule would have to have certain other capabilities relevant to specific provisions of the rule. The Department seeks comment on whether there are additional quality control measures manufacturers or employers should take to make sure that individual devices are made and operated properly (beyond those proposed elsewhere in this NPRM).

First, the EBT (itself, or via a separate printer that would be present at the collection site) would have to be able to print three copies of each test result (either simultaneously or consecutively). Second, the EBTs would also have to number each test sequentially, with the numbers visible to both the BAT and the employee before each test and printed out on the

result. The purpose of this requirement is to identify each test result as pertaining to a specific employee. In effect, the employee's signature on the form prior to the test would signify "I am about to take test No. 243." The test result would say "Test No. 243".

Third, the EBT would also have to be able to do an "air blank" or test of the ambient air to ensure that when nobody was breathing into the instrument, it reported zero. An air blank, in other words, is a check of internal calibration. This check of internal calibration of the instrument, conducted both immediately prior to and immediately following each breath test further ensures the accuracy of the result. The EBT would also have to be able to generate printed records of the air blanks along with each test result. Fourth, an EBT would have to be capable of performing a check of external calibration (i.e., a test of its ability to produce a quantitative result consistent, within a given tolerance, of a known alcohol concentration standard).

Checks of external calibration of the instrument using known alcohol concentration standards are essential to validating the accuracy of the EBT. Each EBT model used to meet the requirements of this rule would have to have a Quality Assurance Plan (QAP) provided by the manufacturer and approved by NHTSA. The QAP would specify the manufacturer's recommended methods and frequency for checks of external calibration. This rule also proposes that EBTs would have to be capable of distinguishing ethyl alcohol from acetone at the .02 or greater level.

The Department understands that some EBTs (especially some of those using infrared technology) may now not be programmed to do so, with the result that someone with elevated acetone levels in his or her system (*e.g.*, a person with diabetes) could have a .02 result despite not having ingested any alcohol. The Department believes, based on information from manufacturers, that these specific functions outlined above are available or can be made available with relatively little technical difficulty. The Department seeks comments on this point, as well as on the incremental cost of these items.

Employers would be required to inspect, maintain, and calibrate EBTs. The work would have to be performed by the manufacturer or a certified representative of the manufacturer. BATs who have completed specific training in calibration and maintenance of EBTs may perform such duties if certified by the manufacturer. We seek comment on whether there are means to ensure the quality of work performed in calibration and maintenance of the instruments such that a wide variety of people could perform these tasks. Records of calibration and maintenance would have to be maintained for five years, a period of time equivalent to that required for the retention of positive test records.

Each EBT manufacturer would have to develop and submit to the Department a quality assurance plan (QAP) for each EBT model listed on the NHTSA CPL. This plan would tell the employer how and when to perform checks of external calibration, taking into account variations in EBT use that would affect the frequency of such checks (*e.g.*, stationary vs. mobile use, high vs. low temperatures, and low vs. high numbers of tests). The QAP would establish tolerances for each instrument that define the acceptable limits of deviation from the known alcohol concentration standards. Other inspection, maintenance, and calibration requirements would also be stated. The Department seeks comment on other factors which QAPs should cover.

Employers would have to comply with the QAP. In particular, if an external calibration check revealed that the EBT was out of calibration, the employer would have to take the EBT out of service and fix the problem before the device could be used again for DOT-mandated employee testing.

The Department seeks comment on a number of other questions concerning maintenance and quality control for EBTs. Could there be a problem with manufacturers making their QAPs either too easy (to make customers happy) or too hard (to avoid liability) that NHTSA review would not be able to correct? Are manufacturers qualified to establish such plans? Should manufacturer representatives or technicians do repairs? Do manufacturers make such persons available as part of their normal business practices, and would a requirement to use them have negative cost or quality control impacts? Are state or local government or law enforcement personnel available and qualified to perform repair, maintenance, etc.? Who else would be appropriate to perform maintenance on EBTs to ensure that they work properly? Finally, should there be a technical advisory committee (*e.g.*, composed of representatives of manufacturers, law enforcement agencies, users, academic experts) to provide information to the Department on technical breath testing issues?

The final paragraph of this section would require the employer to store the EBT securely when it is not being used. The purpose of this is to prevent anyone from tampering with the device.

Section 40.55 The Alcohol Testing Site

The requirements for an alcohol testing site are less detailed than the drug testing collection site rules. The site must afford aural and visual privacy to the person being tested, to protect the confidentiality of the process. Any number of arrangements could satisfy this performance criterion, such as a room, a van, or a partitioned-off area. While testing is going on, or when the EBT is present, the site must be able to be secured. Essentially this means that the BAT must have the EBT under his/her control at all times and be able to limit access to the testing area to authorized personnel. For example, while a temporary partition might meet the privacy requirement, it may or may not meet the security and control requirement.

One exception to collection site requirements would be a situation in which meeting all privacy requirements would be impractical, and a test would not happen at all unless it happened in a nonconforming site. We propose this exception only for unusual, spur-of-the-moment situations (like a post-accident test that could not be conducted in a timely manner if all privacy requirements had to be met), not for regular, predictable, matter of course situations. The BAT would provide privacy protections for the employee to the maximum extent feasible.

The BAT, in order to avoid potential mistakes, could administer only one breath test at a time. This refers to actual operation of the EBT only. Assuming that adequate privacy could be maintained, other employees could be waiting, filling out forms, observing the 15-minute period before a confirmatory test, etc. The BAT is also prohibited from leaving the collection site while the testing process is under way, including the waiting period.

Section 40.57 The Alcohol Testing Form

This section would mandate the use of one of the two types of testing forms. One type of form is generated by the EBT and would contain all the necessary identification data, space for required signatures, and breath test results. The form would be used when the EBT prints only the test result and this result is then attached to a standard form containing the test identification data and required signatures. Employers would not be authorized to alter or

customize these forms, so that all alcohol testing forms used nationwide under the rules incorporating part 40 would be standard. The form would be produced in triplicate, with copies to the employee, the employer, and the BAT. The form, whether EBT-generated or a standard printed form, would contain the date and time, sequential test number, employee identifying data, BAT identifying data, and certification statements about the test with signatures by the employee and the BAT.

Section 40.59 Preparation for Testing

The pre-testing procedure would be a relatively simple one. After presentation of identification by the employee (and by the BAT, if requested), the BAT would explain the testing procedures and tell the employee what is required. The BAT and the employee would fill out the testing form and sign it. This would include entering the sequential number of the test that the device indicates is about to be taken.

If the employee refuses to take the test (i.e., by refusing to sign the form or provide breath, or otherwise preventing the test from taking place), the BAT would note the refusal on the form, stop the testing process for that employee, and immediately inform the employer. The employer should provide the BAT with instructions concerning the employee's leaving the collection site.

The proposal would also direct the BAT to start a new test if, for some reason, an event occurred to invalidate the test. For example, if, after the initial test, the second post-test air blank did not show a 0.00 reading, the BAT would run a new initial test using a new form with a new sequential number. If a similar event happened on a confirmatory test, the BAT would start a new form for the confirmatory test with the new sequential number and affix it to the form used for the valid initial test. The Department seeks comment on whether it would be better to have space on the form to record repeat tests in this situation rather than to have a new form filled out.

Section 40.61 Administration of the Initial Test

The first part of the testing process would be to make sure that the EBT is operating properly with respect to detecting the presence of alcohol. In the employee's presence, the BAT would do a "dry run" operation of the EBT by conducting an "air blank" test (*e.g.* a test of the ambient air, assumed to contain no ethyl alcohol). If the device reads anything other than a zero (0.00), the BAT would know something was wrong. If the initial attempt at conducting an air blank test fails (*e.g.* the EBT registers something other than 0.00) the BAT could re-run the air blank once more. The test of the employee would not proceed unless a 0.00 reading was obtained. If the instrument again fails to provide a 0.00 result on the air blank, the EBT cannot be used for testing until a check of external calibration is conducted and the instrument is found to be within the tolerance limits on a known alcohol standard of 0.00.

Next, the BAT, in the presence of the employee, would take an individually-sealed mouthpiece (for the sake of sanitation and to avoid any possible contamination of the mouthpiece by alcohol from previous users) and place it into the EBT. In order to get a sufficient quantity of deep lung air, the employee would be instructed to blow into the mouthpiece for at least six seconds, or until the EBT indicates that an adequate amount of breath has been obtained. If the employee could not produce an adequate amount of breath, the procedures of § 40.65 would apply.

Immediately following the testing of employee's breath, a post-test air blank would also have to be performed, to ensure that the device reads 0.00 after the breath test. Once again, if the instrument did not provide a 0.00 reading on the air blank, the BAT may attempt one additional air blank. If a 0.00 reading still was not obtained, use of that EBT would be discontinued and the previous breath result would be invalid. The Department seeks comment on whether it is necessary to have both the pre- and post-test air blank results printed out and attached to the alcohol testing form. Comments are also sought on whether a post-test air blank is necessary on all tests, or only on those where the breath test result is 0.02 or greater.

If the EBT does not print the test result directly onto the testing form, the resulting printout would be attached to the form in the place provided with some means that would show clear evidence of removal (*e.g.*, tamper-evident tape). The BAT and employee would again sign the form, citing the sequential test number. (However, if the employee refuses to sign, it would not be considered a refusal to be tested, since the employee has in fact taken the test.) If the employee does refuse to sign the form after the result is obtained, the BAT should so note on the form in the remarks section.

In the event the printed result does not match the result displayed on the EBT, the employee and the BAT would both initial or sign a record of such disparity on the form. The test result would be invalid. The Department seeks comment on whether malfunctions of the EBT equipment should result in the employee not being subject to another test using that EBT or another instrument or whether, if the error is immediately detected by the BAT, the BAT would start over and immediately administer another test.

If the result is less than 0.02, the test is "negative." The BAT would report the negative result to the employer. Notification of negative test results may be done telephonically or electronically, but must be followed up with the employer's copy of the testing form. If the result is 0.02 or greater, a confirmatory test would be needed.

The Department notes that, under the alcohol testing legislation, the initial test need only indicate the consumption of alcohol. It is not statutorily required that the initial test be of evidential quality, produce a quantitative result, or have elaborate safeguards. Consequently, it would be legally possible, under the statute, for the Department to permit the use of other testing techniques (*e.g.*, non-evidential breath testing devices) for initial tests, so long as they were capable of identifying alcohol concentration of 0.02 or greater.

The consequences of "false negatives," which may occur with some non-evidential techniques, present serious safety concerns. The Department believes, in addition, that use of non-evidential testing methods would make little sense in the context of this rule. An EBT would have to be available to conduct a confirmatory test very shortly (within 30–60 minutes) after a "positive" initial test in any case. For this reason, the employer would have to incur the costs of EBT availability, to include a properly trained BAT. It would probably be less expensive to use the EBT that is already there for the initial, as well as for the confirmatory test than to use other technologies. Use of EBT technology on the initial as well as any required confirmatory test provides the additional advantage of a more scientifically accurate, sensitive, and specific test result for alcohol content on all tests conducted. Use of non-evidential methods for testing also raises issues of how to document test results and how to prevent fraudulent or "doctored" records of employer compliance with testing requirements. In particular, disposable testing methods present problems in ensuring that initial test results of employees who are in violation of the alcohol misuse standards are not ignored and that the evidence of such violation hidden or

destroyed. The Department seeks comment on this matter.

This discussion is in the context of an extensive, multi-modal testing program, including random testing as well as testing triggered by reasonable suspicion of the occurrence of an accident. Greater protections are needed in such a program, especially in the absence of procedural protections present in some existing programs that may use non-evidential testing methods in some circumstances. For example, the Coast Guard post-accident alcohol testing program can involve an administrative proceeding at which the employee has the opportunity to challenge test results before a license is revoked or an investigative inquiry at which further evidence could be introduced. In any event, the use of non-evidentiary alcohol testing devices alone would not meet the statutory requirement for verification in the testing program proposed by the five modal NPRMs and these proposed procedures.

Section 40.63 Administration of the Confirmatory Test

The confirmatory test could be a second test on the same EBT as the initial test. The statute does not require that the confirmatory test use a different technology. The Department believes that the reliability of EBTs on the NHTSA CPL is such that using the same device would have no adverse effect on the accuracy of tests. In order to guard against any possibility of alcohol on the used mouthpiece affecting the result of the confirmation test. A new mouthpiece would be used for the confirmation test.

Before the confirmatory test, a fifteen-minute waiting period would be observed. The purpose of the waiting period is to ensure that the presence of mouth alcohol (residual alcohol present in the mouth from the recent use of food, tobacco or hygiene products) does not artificially raise the test result. The BAT would instruct the employee to avoid actions that could increase mouth alcohol (*i.e.*, using tobacco products, mouthwash, breath spray, cough drops, lozenges, or other food or medicinal products containing alcohol) during the waiting period. The test would proceed even if the employee disregarded the instructions, however, since they are for the employee's protection. This rule proposes that the 15 minute waiting period be observed before the confirmatory test rather than before the initial test as a means to reduce lost time and costs in administering the testing program. Since no adverse actions may be imposed on the basis of the initial test results, the employee protections afforded by the waiting period are only necessary for the confirmation test. It is assumed that the vast majority of employees will not have impermissibly consumed alcohol immediately prior to testing and that the time necessary to prepare for the initial test and complete the form will, in fact, provide ample opportunity for residual mouth alcohol to dissipate.

The Department seeks comments on the costs and benefits of having this waiting period before all initial, rather than confirmatory, tests. The Department also seeks comment on the proposal to establish a 20-minute maximum for the waiting period, between initial and confirmation tests. The purpose of establishing a maximum limit for the waiting period is to prevent the manipulation of confirmation results by affording time for the metabolism of alcohol so that results will be lower than first recorded on the initial test. Should there be greater flexibility in the timing of confirmation tests?

In addition, the Department is looking at the issue of whether, to provide additional assurance of an accurate result, a second confirmatory test should be performed when the first confirmatory test is 0.04 or greater. This could help to assure employees of the reliability of results, particularly if the initial test and first confirmation test results were not identical.

Confirmation test results should only be higher than initial test results when an employee has very recently consumed alcohol and is in the absorption phase of alcohol metabolism. Two tests administered after the 15-minute waiting period may provide additional evidence that the result is a true and accurate record of alcohol concentration and could not be due to residual mouth alcohol or any possible interference with the instrument. One variation on a "second confirmation test" procedure would be to require a second confirmation test only when the initial and first confirmation tests differed by more than a given amount (*e.g.*, plus or minus .01 or .02). The Department seeks comments on these matters. Administering three tests (one initial and two confirmation tests) is not required practice in most law enforcement settings. The Department believes that the proposed requirement for pre- and post-test air blank readings on initial and confirmation tests provides sufficient safeguards for ensuring the internal calibration of the instruments. Adding a third test is not required by the statute. A third test would complicate the procedures, increase the opportunity for administrative errors leading to unnecessary invalidation of results, and increase costs.

Typically, under proposed operating administration rules, a confirmed result of 0.04 alcohol concentration or greater requires the employer to remove the employee from performing his or her safety-sensitive duties, pending SAP evaluation to return to work (Consequence A). A result of 0.02 alcohol concentration or higher, but lower than 0.04 alcohol concentration, requires the employer to withhold the employee from performing a safety sensitive duty until the employee tests less than 0.02, or for a prescribed number of hours (Consequence B). Someone who tests negative (less than 0.02) may continue to perform safety-sensitive duties (Consequence C). The NPRM proposes that when the confirmation result is different from the initial test result, the lower of the two results be used for the purposes of determining consequences. For example, if the confirmation result is between 0.02 and 0.04, even though the initial test result was greater than 0.04, the employee would be subject to only the consequences for results in the 0.02–0.04 range. Likewise, if the initial result was 0.02–0.04 and the confirmation test was greater than 0.02 (including greater than 0.04) the consequences of a 0.02–0.04 result would apply. It should be noted that operating administration proposed rules have some exceptions to this general pattern (*e.g.*, an employee must have a result of 0.02 or below to "pass" a return-to-duty test). Under the NPRM's proposal to rely on the lower of the two EBT test results for the assignment of consequences, the following outcomes would occur:

Initial test	Confirmation test	Consequence
0.04 or greater .	0.04 or greater .	A
0.04 or greater .	0.02 or greater but less than 0.04.	B
0.02 or greater but less than 0.04.	0.02 or greater (including 0.04 or greater).	B
0.02 or greater (including 0.04 or greater).	less than 0.02 ..	C
less than 0.02 ..	none	C

The Department seeks comment on the merits of this proposal. Does it present any significant problem in terms of the defensibility of positive test results (*e.g.*, because the result of the initial test, as a practical matter, may sometimes determine the level of consequences)? Should the result of the confirmation test govern in all

instances, regardless of the initial test result?

This section also proposes a procedure for notification of the employer of test results by the BAT. The proposed procedures address the timeliness and methods of transmitting this information.

Section 40.65 Inability to Provide an Adequate Amount of Breath

What happens if the employee allegedly cannot, because of a medical condition, provide sufficient breath to result in a valid test? (This problem is analogous to the "shy bladder" problem in drug testing).

First, the employee would have to attempt to provide sufficient breath. This means that the employee would have to attempt to breathe into the EBT. Failure to attempt to provide breath is treated as a refusal to be tested, and the BAT would note such failure to attempt the test on the testing form and immediately notify the employer. If the employee attempts to provide breath and is unable to do so (*e.g.*, cannot sustain a breath long enough, or cannot provide sufficient deep lung air) the BAT would so note on the form and immediately notify the employer, who would direct the employee to seek a medical evaluation to document his/her inability to provide a breath sample due to medical reasons. The evaluation would have to be done by a physician acceptable to the employer, in order to help maintain the integrity of the process (*i.e.*, to help prevent a situation in which the employee selects a physician who could reasonably be viewed as being biased in favor of the employee). The provision is not intended to allow an employer to arbitrarily veto the use of a physician other than one preferred by the employer. The physician would answer one basic question. Does the employee have a medical condition which has, or with a high degree of probability could have, precluded the employee from providing an adequate amount of breath? If yes, there is no "refusal." If no, the employee is deemed to have refused the test. The Department seeks comment on whether an employee who is unable to provide an adequate amount of breath should be prohibited from performing safety-sensitive duties until the medical evaluation is conducted and the physician's determination made.

It should be noted that this inquiry by the physician would be on a case-by-case, test-specific basis. Physicians would not, under this provision, be authorized to issue a blanket statement that an individual was permanently unable to provide an adequate amount of breath. Such a statement could amount to a waiver from the testing requirement, which would be contrary to the objectives of the Act.

Section 40.67 Invalid Tests

This section proposes a list of "fatal flaws" in the testing process, any one of which would invalidate a test. Other testing procedures errors do not necessarily invalidate a test. The Department seeks comments on whether items should be added to or deleted from this list.

Most of these items are self-explanatory. The Department specifically seeks comment on whether exceeding the 20-minute maximum for the waiting period before the confirmatory test, as well as failing to observe the 15-minute minimum, should invalidate a test. Our view at this time is that the 15 minute minimum waiting period is essential to protect the employee's right to a fair and accurate test. Any failure to provide at least the 15 minute waiting period before the confirmation test would result in the confirmation result being invalid. Because the 20 minute maximum on the waiting period is not an employee protection procedure (in fact, additional delay could be helpful to employees), if the waiting period between tests exceeds 20 minutes, the confirmation test would remain valid. The Department seeks comment on whether, if the BAT notices a potentially fatal error in the testing process (*e.g.*, the BAT has failed to sign the form or has failed to run a post-test air blank), before the employee has left the alcohol testing site, should the BAT be able to direct the employee to take another test to correct the problem. Should it make any difference if the error is a "machine error" by the EBT device as opposed to a human error by the BAT?

One "fatal flaw" that could create difficulty is a situation in which a check of external calibration indicates that the instrument is not properly calibrated. The NPRM proposes that, in this situation, all positive results back to the last check of external calibration that established the instrument's accuracy would be invalidated. This result appears to have merit technically, but the retroactive invalidation of results may create a number of problems in the administration of the program and employers' personnel decisions. Since confirmed results are available immediately and once notified employers are required to take action prohibiting the performance of safety-sensitive duties by employees who are found to have violated the alcohol misuse standards, tests invalidated at a later date may result in the reversal of personnel actions, including a restitution of back pay. The Department seeks comment on the necessity of this provision and suggestions for dealing with problems it could potentially cause if it is made part of the final rule. It appears, for example, that an employer could conduct more frequent external calibration checks than required by the manufacturer's QAP (*e.g.*, after every positive, at the end of every test day) to mitigate problems for subsequent personnel actions.

Section 40.69 Availability and Disclosure of Alcohol Testing Information About Individual Employees

This section would be parallel to similar material in the drug testing procedures. The general rule is that information is confidential and may not be released to third parties without the employee's written consent. The employer could release information in the context of a proceeding relating to an employee benefit, to DOT agency action against the individual (*e.g.*, an action to revoke a certificate), or to an NTSB safety investigation, however. The employer would also have to make information available to DOT offices having regulatory or review authority.

Information would also be made available to the employee upon written request. Employers or their agents could not charge employees for more material than the employees requested (*e.g.*, for an entire package of information when the employee requested only a statement of the test result). The Department seeks comment on this provision.

This section uses the term "employer." Since the employer is responsible for the compliance of other parties to the process (*e.g.*, consortias, contractors, agents, BATs, etc.), we thought it unnecessary to specify these other parties here. The Department seeks comment on whether other parties should be named in this section.

Section 40.71 Maintenance and Disclosure of Records Concerning EBTs and BATs

This section would require employers to maintain records of the inspection, maintenance, and calibration of EBTs, compliance with the manufacturer's QAP, and records of the training and proficiency of BATs. The access requirements and disclosure protections are parallel to those in § 40.69. Employers who contract with other parties for alcohol testing services

would be required to ensure that their contractors followed this requirement.

Section 40.73 Definitions

The proposed subpart would define several terms that are used only here, or used in a different sense than in the drug context. *Air blank* would be defined as a test of ambient air. *Alcohol* would refer to ethyl alcohol, in whatever form. The proposed rule regards alcohol in the system, whatever its source, as a safety problem. Someone who registers a .03 concentration as the result of use of a product containing alcohol, even if for medical purposes, is no less impaired than he or she would be at the same alcohol concentration after drinking an alcoholic beverage.

The rule would use the term *alcohol concentration*. The more familiar "blood alcohol concentration" could be misleading, since these procedures do not call for the use of blood. The concentration is expressed in terms of grams of alcohol per 210 liters of breath, as indicated by an EBT.

Collection site, initial test, and *confirmation test* all are terms used in the drug testing portion of the part 40. Separate alcohol testing-specific definitions are used here, however. The *breath alcohol technician* (BAT) is analogous to the collection site person under the drug testing procedures, and *alcohol testing site* is analogous to *collection site.*

An *evidential breath testing device* (EBT) is any breath testing device that NHTSA has approved and put on its conforming products list. It is not relevant for purposes of this rule whether the courts in any particular state have accepted a given device for use in driving under the influence (DUI) or other legal proceedings in that state. As a matter of Federal law, NHTSA-approved EBTs would be used for all tests under these rules, regardless of the status of a device under state law.

An *invalid* test is one which has been declared invalid under the provisions of § 40.67. It is neither positive nor negative. The concept is similar to that of a canceled test in the drug testing procedures. For example, if a negative test is needed before a worker may begin performing a safety-sensitive function, an invalid test would not suffice, and the employee would have to have another test conducted. Likewise, if a test result of 0.04 or higher is declared invalid, the consequences of the test result would not apply.

Section 40.81 Reporting Drug Testing Information to the Department of Transportation

The DOT Office of Drug Enforcement and Program Compliance (a unit of the Office of the Secretary whose function is to coordinate DOT drug and alcohol testing programs) created a working group with representatives from the operating administrations to develop a comprehensive plan for a Management Information System (MIS) to obtain and analyze employer drug program data. This group drew on the experience of the FRA and FAA which already had reporting requirements in their regulations.

On November 27, 1989, the General Accounting Office (GAO) published a report on the status of the program promulgated by the DOT regulations. A primary recommendation in the GAO report was that "The Secretary of Transportation adopt evaluation criteria and provide the administrations with guidance on the types of program information they should be getting from employers to evaluate program success."

Although 49 CFR part 40, as a procedural rule, is applicable to each of the Operating Administration's drug testing rules, implementation of each administration's program is somewhat different, reflecting differences in the transportation industries. Collecting and managing program data from each of the industries is essential to evaluation of the effectiveness and credibility of the drug testing program. The DOT working committee appointed to develop an appropriate MIS for DOT has identified standard data elements which are critical to the review and management of the DOT and operating administrations' drug programs. This data will be the basis for monitoring implementation, compliance and enforcement, and evaluating the effectiveness of the drug testing programs. The regulated employers are the appropriate source for most drug testing data. DHHS certified laboratories can provide only laboratory analysis data, medical review officers can only provide drug test verification information, and collection facilities can only provide specimen collection data. Employers, however, receive the information from labs, MROs and collection facilities and therefore can provide the necessary cumulative data. The data that would be gathered by the proposed MIS for program evaluation could permit adjustments of different program elements. It is difficult to indicate what changes could be made without first gathering and analyzing the data. The data could show a lack of need for testing for certain drugs or indicate a need for modifying testing requirements based on such factors as the type of position or success of a particular company's anti-drug program. The Department believes that it is necessary, first, to determine that its programs are operating, are meeting their objectives as efficiently as possible and, second, if not, to make modifications to ensure that they do. The Department believes that the costs of reporting being proposed are both cost beneficial and effective, but welcomes public comment on this issue. One example of the use of data that would be gathered by the proposed MIS for program evaluation concern potential adjustments of the random testing rate. The main purpose of random testing is deterrence. Relatively higher random testing rates are likely to be more effective as a deterrent to illegal drug use than relatively lower rates. At the same time, relatively higher random testing rates are more expensive to industry. Decisions concerning random rates necessarily are based on considerations of deterrence, the effectiveness of current measures, and cost. The information the proposed system would gather would make rational, well-informed decisions about adjustment to random testing rates possible.

In addition, because the proposed system would gather information about individual employers, it could make possible consideration of employer-based, rather than industry based, random rates. For example, if a particular employer had an effective anti-drug program that resulted in very low detected drug usage over a reasonable period of time, it might be possible for that employer to test at a low random rate regardless of the situation of the entire industry of which it is a part.

The proposed §§ 40.81 and 40.83 would establish a standard DOT Management Information System (MIS) and require that employer reports be submitted to the appropriate Operating Administration. Each Operating Administration will amend its drug testing regulation to provide specific requirements for employer reporting. Elsewhere in today's **Federal Register** are Notices of Proposed Rulemaking for each of the Operating Administrations (FRA, FAA, USCG, RSPA, FHWA, FTA) with drug and/or alcohol testing rules.

Although each employer or employer's representative must maintain the data required in 40.41 as per the regulating administration rule, each OA may elect not to require all

employers to submit reports annually but instead select a representative sample for submission to the OA. Each OA rule establishes employee categories or positions covered by the OA rule. OA's have the option to require drug testing information be separated by employee category as established in their rules, or to establish other categories for reporting purposes, (i.e. licensed or unlicensed or in a single category).

Operating Administrations may allow data usually maintained by industry or commercial consortia to be submitted on behalf of individual employers. Operating Administrations that allow consortia or other service providers to maintain data, such as pre-employment test data, may allow submission of such data to the OA in aggregate figures if it cannot be attributed or assigned to a specific employer.

OA's must stipulate in their regulations that employers who fall under two or more DOT Agency regulations requiring drug testing, must submit data to each regulating OA for those employees covered by that OA rule. For example XYZ company has 100 employees subject to the RSPA rule, 50 employees covered by the FHWA rule and 25 employees covered by the FAA rule. XYZ must maintain data attributable by OA rule. Employees who perform functions covered by more than one OA should be identified by the employer as to which covered position they will be reported under. Drug testing data on dual covered employees should be reported to the appropriate OA. Generally, pre-employment, random, and return to duty tests should be reported to the OA which regulates the function used as the basis for employee category. Post-accident tests should be reported to the OA to whom that accident is reportable. Reasonable cause and periodic tests should be reported to the OA based on the employee function requiring the test.

Each OA may acquire any of the data elements through an alternative methodology. For instance, if an employer is already required to submit a post accident drug test report to the OA, the OA could consolidate those reports that would provide the necessary data and not request this data from the employer again.

The data elements will provide a factual base for decisionmaking concerning modifications to the DOT drug testing rules. Information about drug use prevalence, program implementation, and economic and logistical impact will provide a basis for policy review, development, and change. Issues such as scope of applicability, random test rates, cost benefit ratios, rehabilitation, and testing protocols can be more effectively addressed when industry-wide data is available. Program evaluation and determinations of the rules' effectiveness require feedback from the regulated industries. Over-regulation is as unwanted as under-regulation. The data made available under this NPRM will provide necessary indicators of the "outcomes" of the rules. The data elements were selected as the minimum necessary to provide information on the scope of the program, drug use and prevalence, program implementation, economic impact, employer policy and the deterrent effect of the rules over time. The drug rules were not intended to be static (*i.e.* unchangeable). A systematic program to collect, analyze, and interpret the drug testing data is necessary to provide a more effective and efficient approach to drug use deterrence and detection.

The Department seeks comment on a number of issues concerning the NPRM's basic approach to gathering needed data. With the exception of the FHWA NPRM, the proposals would seek to obtain information from all covered employers. (The FHWA NPRM would ask for information from a sample of employers, since FHWA does not have the resources to process data from the large number of covered employers in the motor carrier industry.) In particular, the Department seeks comment on the merits of seeking information only from a sample of covered employers, rather than from all employers. In answering this question, we ask commenters to keep in mind the Department's dual purpose in obtaining drug testing information: program evaluation and enforcement.

All the Operating Administrations require compliance with regulations by all regulated employers. All the Operating Administrations, except FHWA, normally require reporting, from all their regulated employers. This may not be necessary in this program. DOT request comments regarding less than 100% reporting in each industry. How would sampling work in each industry? Would a multi-tierd approach work, where small employers (less than 50 covered employees) would not be required to submit reports but larger employers (greater than 50 covered employees) would have to submit reports. What other methodologies or options would provide requisite data, be enforceable, provide adequate compliance data and be equitable.

The Department recognizes that any reporting requirement will impose burdens on employers. These burdens have been analyzed in the regulatory evaluation for the operating administration regulations that are part of this effort. The Department seeks comments on ways of achieving the objectives of this rulemaking with a smaller burden.

In a sampling approach, the Department would select a percentage of employers in each covered industry and require them to submit data to the Department. This approach would have the potential advantage of requiring reporting from fewer employers than under the Department's proposal, thereby reducing overall reporting costs. In such an approach, in the various regulated industries, what would appropriate sample percentages be? How much money and effort would be saved?

Sampling, if practicable in DOT's circumstances, might produce useful program evaluation information. However, we are concerned whether, under a sampling approach, the Department's objective of gathering data useful for enforcement purposes could be met. To be useful for enforcement with respect to a particular employer, data must pertain to that individual employer. If the Department collected data on only two percent or ten percent of employers in a given industry, how could the Department's enforcement objectives be met with respect to the employers who were not part of the sample? Would reporting be easier or harder on employers than a situation in which more Federal Inspectors had to visit employers' offices on a periodic basis to gather drug testing compliance information?

We have concerns about whether, in the Department's situation, sampling would be a practicable way of getting useful program evaluation information. Statistical samples can be useful in providing an estimate for an entire population. The primary reason for using a sample is efficiency in data collection. Sampling allows the generation of an estimate of a value for an entire population with the error of the estimate known based on data only from selected members of the population. The key to defining the known error is being able to specify the relationship of the sample to the entire population.

If one cannot identify or enumerate the population, it is not possible to specify the error in the estimate. In some industries subject to DOT drug testing, it is extremely difficult to identify or enumerate the population. That is, the operating administrations, in many cases, do not know or cannot readily retrieve the numbers of

regulated parties, their identities, and their addresses. There is an estimated five to twenty percent turnover in the regulated population each year, depending on the mode.

This situation poses a number of problems for the Department in attempting to operate under a sampling approach, and we request assistance from commenters in dealing with them. For example, how would the Department know the size of the population with sufficient precision to permit reliable statistical inferences? How would the Department inform participants in the sample that they were required to submit data at a particular time? Obviously, it is hard to mail questionnaires to employers whose addresses are not known but such an approach may be practicable after a one year "full census". For example, would it be feasible to have all employers report some information (*e.g.*, a core of items needed for enforcement) while a sample of employers reported additional information (*e.g.*, related solely to program evaluation?). Would such an approach be more rather than less confusing, could it avoid some of the drawbacks of sampling, and would it result in significant reductions in burdens to employers?

In spite of possible lower costs to respondents, a sampling approach could add significant administrative costs to the Department. (*e.g.*, to create research designs, identify respondents, mail out questionnaires or forms, and follow-up non-responses, etc.) The Department asks for comment and continues its own evaluation on how the transaction costs of alternative means of compiling the needed data can be minimized, consistent with program evaluation and enforcement needs.

Under either a sampling or more comprehensive approach, it might reduce costs if employers could report needed data electronically. The approach has proved useful, for example, in implementing the requirement that air carriers report certain tariff information to RSPA. The Department has developed an electronic Information Service called the Anti-Drug Information Center (ADIC). The Department seeks comments on whether adding an electronic filing capability to ADIC for MIS information would be useful. If so, what implementation problems do potential users see and how might they be resolved?

The GAO report specifically recommended that the Department obtain from employers the cost of implementing the program as an element of information to evaluate program success. The purpose of gathering such information would be not only to do analyses of the cost of implementing proposed regulations but also to periodically evaluate those regulations that are issued to determine whether they are achieving their intended purpose. Such an analysis would include the cost of implementing the rules, as well as an analysis of the benefits that are being achieved. With respect to the drug testing rules, many of the costs are easily identifiable. It should not be difficult, for example, to determine the charge that the company incurs to have a laboratory test a urine specimen. It may be difficult, however, to clearly identify some indirect costs, such as consequential costs of transportation delays caused by the collections. Moreover, to the extent we were to seek cost information from the companies implementing the drug testing programs, are existing accounting systems set up to capture such costs in a manner that would be specific to anti-drug compliance? If they were, could we be assured that the different accounting standards that might be used would permit comparison of data from different companies?

Similar questions are raised with respect to benefits. For example, we can determine that a specific number of individuals have tested positive and been removed from safety-sensitive positions. Although the removal of such individuals would clearly have safety benefits, will we be able to identify the direct consequences, such as a reduction in accidents? Will we be able to obtain data concerning the indirect benefits, such as better productivity and decreased absenteeism?

Perhaps the most thorough way to collect this data on cost and benefits would be to require the regulated industries to provide it to DOT. Based on such reports, the Department could evaluate the existing rules to determine whether they needed to be modified to improve upon their cost-benefit ratio. Alternatively, the cost data might be obtained through stratified or other means of sampling. The Department is seeking the best means of obtaining the following data:

Program costs for
—Specimen collection
—Laboratory testing
—MRO services and
—Education and training

The Department does not normally require cost reporting as a part of safety regulations. Cost reporting would be justified here, however, because it involves a new program involving a large number of vendors other than the regulated industry. That is, it is not traditional industry costs that are at issue. Further, the drug testing vendors have occupied what amounts to a new market for services with respect to which projections made by the agency's economic analysis (prepared in support of the rulemaking) may or may not be currently valid. That is, any cost reporting requirement may constitute a distinct exception to the rule that cost data should ordinarily be obtained in informal market surveys and through voluntary rulemaking submissions without resort to compulsory information collections. However, while there are some potential uses for cost data, there are also some serious potential problems. Asking for companies' costs for certain programs could result in the collection of what was, or what companies asserted was, proprietary information (either for themselves or their contractors). Doing so could create complications not only in the collection of the information, but also the Department's use of the information and the handling of requests from third parties for the release of the information. Moreover, reporting of cost information may be a more difficult, time-consuming, and expensive process for employers than the reporting of other drug testing information. For these reasons, the Department is not proposing to collect cost information at this time. The Department does seek comment on whether cost information should be collected and, if so, what specific information should be requested.

In addition, the Department seeks comment on a number of specific questions concerning the collection of cost information. We request comment on how expensive it would be for industry to provide this data. For example, is some or all of this data so readily available that it would be neither difficult nor expensive for the regulated industries to provide it to the Department in response to a reporting requirement? Would some cost or benefit data be so difficult for individual companies to obtain that it should not be required? Without this data would it be appropriate to request some data or would that data be misleading in the absence of all cost or benefit data? Are the four data elements on costs, listed above, that the Department wishes to collect sufficient? What other data should be collected?

The collection of actual cost data would have the aim of evaluating actual market conditions in a rapidly developing industry (*e.g.*, drug testing consortia, certified laboratories, collection services). (It must be assumed that prices and service packages will

stabilize after an initial period and that the Department will make reasonable prompt decisions with respect to adjustment of initial regulatory requirements in light of program experience. If cost data are collected, should the requirements contain an automatic expiration date? What would be a reasonable period (*e.g.*, 3 years, 4 years, etc.)?

The resolution of this issue also depends on the resolution of the sampling question. If we choose, for example, a two-tiered approach (*e.g.*, a core of enforcement data and the other tier for evaluation), we might also request the specific cost data as well as data relating to the indirect costs and benefits of the program.

Notwithstanding all the proceeding discussion justifying that program cost information is vital to DOT, DOT requests comments on the appropriateness and necessity of requesting cost data. Put another way, do employers desire to share with DOT specific program cost data to demonstrate the cost of compliance?

Each report under the proposed § 40.81 would cover a calendar year. An Operating Administration may require more frequent submission of reports. The closing date would be December 31 and the report would be due at the Operating Administration by February 15 of the following year. The transportation employer report would include each of the following data elements. The Department seeks comments on whether any of these elements should be modified or deleted, or whether any other elements should be added.

1. Number of covered employees by employee category. This data is necessary to assess the scope of the rule's application and provide a basis for determining if random testing meets the required 50% level.

2. Number of covered employees subject to testing under the anti-drug rules of more than one DOT Agency, identified by each agency. This data is necessary to review multi-modal implementation so that policy can be designed accordingly.

3. Number of specimens collected by type of test (*e.g.*, pre-employment, periodic, random, etc.) and employee category. This data is needed to check the compliance with the rules by category and to review collection, testing and the review process.

4. Number of positives verified by a Medical Review Officer (MRO) by type of test, by type of drug and employee category. This data, along with the number of tests performed, permits the calculation of positive rates necessary to determine the extent of drug use and the specific drugs detected in the various categories of employees. Further, analysis of this data over time will provide a measure of the effectiveness of the drug testing rules in deterring drug use.

5. Number of negatives verified by a MRO by type of test, and employer category. This data is needed to check compliance with the rules by category and to review the application of the components of the programs.

6. Number of persons denied a position as a covered employee following a verified drug test. This data provides an assessment of whether the testing program is being implemented as required, provides a measure of the impact of the drug testing rules on the industries, and yields information on the prevalence of drug use in the applicant pool.

7. Number of covered employees verified positive by a MRO, who were returned to duty in covered positions during the reporting period. This data provides information on employer policy implementation regarding reentry requirements and rehabilitation of identified drug users.

8. Number of employees with tests verified positive by a MRO for multiple drugs. This data provides information on the extent of polydrug use in the regulated industries.

9. Number of covered employees who refused to submit to a drug test required under this part, and the action taken in response to the refusal(s). This data provides information on employer policy implementation regarding refusals and subsequent employer actions.

10. Number of covered employees and supervisors who have received required training during the reporting period. This data provides information on training provided during the current reporting period and a cumulative count of covered employees and supervisory personnel on payroll as of December 31 who have received the required drug training.

DOT has developed a standard form for use by employers to provide the data required by this regulation. It is attached as an appendix to this proposed rule Operating Administration rules may require addenda and authorize modifications to this form to be submitted to that Administration Additionally, OA's may authorize electronic submission of the required report as prescribed in their rules The Department seeks comment on whether these information elements, or the form on which the data would be gathered, are sufficiently clear and simple for use by employers, particularly small businesses. We are receptive to suggestions for making the form and information elements easier to use. For example, consistent with the Department's dual goals of information for program evaluation and enforcement, would it be helpful to separate the data gathering into two parts: One form with only enforcement-related elements that all employers would submit, and a second form with additional program evaluation information that would be submitted by a sample of employers. Aside from the issues surrounding the practicability of samples (see discussion above), would such an approach be helpful? Could it turn out to be more complex and difficult to deal with than the proposed approach?

Many small businesses that are required to participate in the DOT drug testing program do so through consortia. The Department seeks comment on the extent to which the use of consortia may mitigate any problems that smaller firms could have in dealing with the forms and information elements. The generic reporting form presented at appendix A can appear somewhat complex. For example, FAA has 8 categories of employees. Taken together with 6 types of testing (pre-employment, random, etc.) and five types of drugs, there would be a considerable number of data entries. For a small employer, this could appear unnecessary or burdensome. The modes (e.g. FAA) currently utilize fairly simple formats that are used by employers. Would commenters find the more complex instrument burdensome? If DOT decides to utilize it, should we allow small employers (particularly those who may not belong to a consortia) to continue to use existing formats? One of the specific areas on which the Department seeks comment is on the structure of the form in collecting several variables simultaneously versus on separate questions or matrices? The proposed structure is considerably shorter, than separate questions/matrices, but is it too complex? In general, the Department seeks to make the reporting of drug testing information as simple as possible while minimizing unnecessary burdens.

If the Department adopted a two-tiered approach (i.e. a core of data for enforcement and more detailed data for program evaluation, perhaps through sampling), the potential burdens of a more complex instrument would be reduced. Comments are invited on this issue.

The Department could also take a tiered approach as some of the OA's did in the case of the 1988 final rules

regarding the submission of plan requirements. All employers with 50 or more employees would report additional data needed for program evaluation purposes during the first year and a staged and/or short-form type of reporting (including perhaps a sampling of smaller firms) would apply after the first year for employers with 11–50 employees as well as those for 10 or fewer employees. Again, comments are particularly invited on how such an approach could serve the Department's program evaluation needs while providing data essential for enforcement purposes.

Section 40.83 Reporting Alcohol Testing Information to the Department of Transportation

This section, in conjunction with provisions of the five operating administration NPRMs, would require employers to maintain certain annual alcohol program data and report that data to the appropriate Operating Administration. The provision is parallel to the MIS provision for drug testing discussed above, and many of the same questions and requests for comments apply here as well. Each Operating Administration NPRM proposes specific requirements for employer reporting. The most thorough way to collect program data is to require the regulated industries to provide it to DOT. Based on such reports, the Department could evaluate the existing rules to determine whether they needed to be modified to improve upon their cost-benefit ratio. The Department has set forth in this proposal the information that it believes is necessary to enable it to effectively evaluate and to check compliance with the proposed rules.

Regulatory Analyses and Notices

Executive Order 12291

This proposed rule is not a major rule under Executive Order 12291. It is a significant rule under the Department's Regulatory Policies and Procedures. The Department has prepared a regulatory evaluation in connection with this proposed rule, which gives attention to the costs of testing under the proposed procedures and to costs for small employers, among other subjects. This evaluation is available for review in the docket for this rulemaking. The costs of compliance with this proposal have also been evaluated as part of the operating administrations' economic analyses prepared in connection with their proposed rules.

Federalism

This rule does not have any direct Federalism impacts on state or local governments. Although it would apply to certain state or local agencies (e.g., transit authorities) this application would be through operating administration rules and any federalism impacts will be discussed in their proposed rules. It should be pointed out that a substantial majority of affected parties are private businesses and individuals, rather than state or local governments. The operating administrations' general statutory safety authority and the Act provide preemptive effect over conflicting state and local law, but these effects are considered as part of the operating administration rules. For these reasons, it has been determined that this proposed rule does not have sufficient Federalism impacts to warrant a Federalism assessment under the principles and criteria contained in Executive Order 12612.

Regulatory Flexibility Act

The Act and operating administration statutory safety authority apply to all covered providers of transportation services, regardless of size. While small entities are affected by this proposed rule, it is through the medium of the operating administration rules (which themselves have some special provisions for small entities) and the impact is analyzed in their rulemaking documents. The necessity of uniform testing procedures for all employees makes it impractical to have special provisions for small entities in these procedures. Moreover, it is the alcohol testing requirements of the Act itself that will have economic effects on small entities, and the operating administrations' rules will provide the opportunity for small entities to participate in volume purchases of equipment and services through consortium or other arrangements. The Department certifies that these procedures (as distinct from the operating administration rules that require alcohol testing) will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

The Paperwork Reduction Act applies to this NPRM and the modal alcohol testing NPRMs because they initiate new information collection requirements (i.e., the management information system provisions of subpart D of this NPRM and corresponding provisions of the modal NPRMs). The NPRMs would also change some existing collections of information. It is difficult for the Department, at this time, to estimate the cost or precise paperwork burden of these proposals. DOT believes that employers would maintain most of the reportable information as part of their normal operation of the proposed alcohol testing program. The principal cost to employers would be that of compiling the information and transmitting it to the operating administrations. DOT and each operating administration solicits comments on the practical utility of the information, alternative methods that might achieve program objectives while being less burdensome, and the cost and burden of providing the information. Persons desiring to comment on this topic should submit their views to the docket for part 40 and/or one or more of the operating administrations' NPRMs.

The Department will request OMB approval of these information collection requirements, which would be enforceable until OMB clearance.The Department will publish a **Federal Register** notice when we receive Paperwork Reduction Act approval.

List of Subjects in 49 CFR Part 40

Alcohol abuse, Drug abuse, Reporting and recordkeeping requirements, Safety.

Issued this 2nd day of December 1992, at Washington, DC.

Andrew H. Card, Jr.,

Secretary of Transportation.

Thomas C. Richards,

Administrator, Federal Aviation Administration.

Thomas D. Larson,

Administrator, Federal Highway Administration.

Gilbert E. Carmichael,

Administrator, Federal Railroad Administration.

Brian W. Clymer,

Administrator, Federal Transit Administration.

Douglas B. Ham,

Deputy Administrator, Research and Special Programs Administration.

Adm. J. William Kime,

Commandant, United States Coast Guard.

For the reasons set forth in the preamble, the Department of Transportation proposes to amend title 49, Code of Federal Regulations, part 40, as follows:

PART 40—PROCEDURES FOR TRANSPORTATION WORKPLACE DRUG AND ALCOHOL TESTING PROGRAMS

1. The authority citation for part 40 is revised to read as follows:

Authority: 49 U.S.C. 102, 301, 322; 49 U.S.C. app. 1301nt., app. 1434nt., app. 2717, app. 1618a.

2. The title of part 40 is revised to read as set forth above.

3. Section 40.1 through 40.19 are designated subpart A, reading as follows:

Subpart A—General

40.1 Applicability.
40.3 Definitions.
40.5–40.19 [Reserved]

Subpart A—General

§ 40.1 Applicability.

This part applies, through regulations that reference it issued by agencies of the Department of Transportation, to transportation employers, including self-employed individuals, required to conduct drug and/or alcohol testing programs by DOT agency regulations and to such transportation employers' officers, employees, agents and contractors (including, but not limited to, consortia). Employers are responsible for the compliance of their officers, employees, agents and contractors with the requirements of this part.

§ 40.3 Definitions.

The following definitions apply to this part:

DHHS. The Department of Health and Human Services or any designee of the Secretary, Department of Health and Human Services.

DOT agency. An agency of the United States Department of Transportation administering regulations related to drug or alcohol testing, including the United States Coast Guard (for drug testing purposes only), the Federal Aviation Administration, the Federal Railroad Administration, the Federal Highway Administration, the Federal Transit Administration, the Research and Special Programs Administration, and the Office of the Secretary.

Employee. An individual designated in a DOT agency regulation as subject to drug testing or alcohol testing. As used in this part "employee" includes an applicant for employment. "Employee" and "individual" or "individual to be tested" have the same meaning for purposes of this part.

Employer. An entity employing one or more employees that is subject to DOT agency regulations requiring compliance with this part. As used in this part, "employer" includes an industry consortium or joint enterprise comprised of two or more employing entities. No single employing entity is relieved of its responsibility for compliance with this part by virtue of participation in such a consortium or joint enterprise.

Secretary. The Secretary of Transportation or the Secretary's designee.

§§ 40.5–40.19 [Reserved]

4. Sections 40.21 through 40.39 are proposed to be designated subpart B and § 40.41 is added as follows:

Subpart B—Drug Testing

40.21 The drugs.
40.23 Preparation for testing.
40.25 Specimen collection procedures.
40.27 Laboratory personnel.
40.29 Laboratory analysis procedures.
40.31 Quality assurance and quality control.
40.33 Reporting and review of results.
40.35 Protection of employee records.
40.37 Individual access to test and laboratory certification results.
40.39 Use of DHHS-certified laboratories.
40.41 Definitions.

Authority: 49 U.S.C. 102, 301, 322; 49 U.S.C. app. 1301nt., app. 1434nt., app. 2717, app. 1618a.

4a. In § 40.25, paragraph (f)(10) is proposed to be revised to read as follows:

§ 40.25 Specimen collection procedures.

* * * * *

(f) * * *

(10) The collection site person shall instruct the employee to provide at least 45 ml of urine under the split sample method of collection or 30 ml of urine under the single sample method of collection.

(i) (A) Employers with employees subject to drug testing only under the drug testing rules of the Research and Special Programs Administration and/or Coast Guard may use the "split sample" method of collection or may collect a single sample for those employees.

(B) Employers with employees subject to drug testing under the drug testing rules of the Federal Highway Administration, Federal Railroad Administration, Federal Transit Administration, or Federal Aviation Administration shall use the "split sample" method of collection for those employees.

(ii) Employers using the split sample method of collection shall follow the procedures in this paragraph:

(A) The donor shall urinate into a collection container, which the collection site person, in the presence of the donor, pours into two specimen bottles.

(B) The first 30 ml of urine shall be poured into a specimen bottle to be used for the primary specimen.

(C) The remainder of the urine shall be poured into another specimen bottle for the split specimen.

(D) In an unusual or emergency situation in which a collection container is not available or it is not practicable to pour the urine from the collection container into two specimen bottles, the donor can use a single specimen bottle and the collection site person shall pour 30 ml of urine from the specimen bottle into a second specimen bottle (to be used as the primary specimen) and retain the remainder in the collection bottle (to be used as the split specimen).

(E) Both bottles shall be shipped in a single shipping container, together with copies 1,2, and the split specimen copy of the chain of custody form, to the laboratory.

(F) If the test result of the primary specimen is positive, the employee may request that the MRO direct that the split specimen be tested in a different DHHS-certified laboratory for presence of the drug(s) for which a positive result was obtained in the test of the primary specimen. The MRO shall honor such a request if it is made within 72 hours of the employee having been notified of a verified positive test result.

(G) When the MRO informs the laboratory in writing that the employee has requested a test of the split sample, the laboratory shall forward, to a different DHHS-approved laboratory, the split specimen bottle, with seal intact, a copy of the MRO request, and the split specimen copy of the chain of custody form with appropriate chain of custody entries.

(H) The result of the test of the split sample is transmitted by the second laboratory to the MRO.

(I) Action required by DOT agency regulations as the result of a positive drug test (e.g., removal from performing a safety-sensitive function) is not stayed pending the result of the test of the split sample.

(J) If the result of the test of the split sample fails to reconfirm the presence of the drug(s) or drug metabolite(s) found in the primary specimen, the MRO shall cancel the test, and report the reasons for the cancellation to the DOT.

(iii) Employers using the single sample collection method shall follow the procedures in this paragraph:

(A) The collector may choose to direct the employee to urinate either directly into a specimen bottle or into a separate collection container.

(B) If a separate collection container is used, the collection site person shall, after determining specimen

temperature, pour the urine from the collection container into the specimen bottle in the presence of the employee.

(iv) In either collection methodology, upon receiving the specimen from the individual, the collection site person shall determine if it has at least 30 milliliters of urine for the primary or single specimen bottle and, where the split sample collection method is used, an additional, measurable amount of urine that can be poured into the split specimen bottle. If the individual is unable to provide such a quantity of urine, the collection site person shall instruct the individual to drink not more than 24 ounces of fluids and, after a period of up to two hours, again attempt to provide a complete sample using a fresh collection container. If the required amount is provided, the original insufficient specimen shall be discarded. If the employee is still unable to provide an adequate specimen, the insufficient specimen shall be discarded, testing discontinued, and the employer so notified. The MRO shall refer the individual for a medical evaluation to develop pertinent information concerning whether the individual's inability to provide a specimen is genuine or constitutes a refusal to test. (In preemployment testing, if the employer does not wish to hire the individual, the MRO is not required to make such a referral.) Upon completion of the examination, the MRO shall report his or her conclusions to the employer in writing.

* * * * *

5. In § 40.29, paragraph (b)(2) is proposed to be revised and (b)(3) is proposed to be added, as follows:

§ 40.29 Laboratory analysis procedures.

* * * * *

(b) * * *

(2) In situations where the employer uses the split sample collection method, the laboratory shall log in the split sample, with the split specimen bottle seal remaining intact. The laboratory shall store this sample securely (see paragraph (c) of this section). If the result of the test of the primary sample is negative, the laboratory may discard the split sample. If the result of the test of the primary sample is positive, the laboratory shall retain the split sample in long-term frozen storage for one year (see paragraph (h) of this section). Following the end of the one-year period, or if informed in writing by the MRO that the employee has not requested a test of the split sample, the laboratory may discard the split sample.

(3) When directed in writing by the MRO to forward the split sample to another DHHS-certified laboratory for analysis, the receiving laboratory shall analyze the split specimen by GMS to reconfirm the presence of the drug(s) or drug metabolite(s) found in the primary specimen. Such GMS confirmation shall be conducted without regard to the cutoff levels of § 40.29(f). The split sample shall be retained in long-term storage for one year by the laboratory conducting the analysis of the split sample (or longer if litigation concerning the test is pending).

* * * * *

5a. In § 40.33, paragraphs (e), (f) and (g) are proposed to be revised as follows:

§ 40.33 Reporting and review of results.

* * * * *

(e) In a situation in which the employer has used the single sample method of collection, the Medical Review Officer shall direct, in writing, a reanalysis of the original sample if requested to do so by the employee within 72 hours of the employee's having been informed of a verified positive test. The MRO may also direct, in writing, such a reanalysis if the MRO questions the accuracy or validity of any test result. Only the MRO may authorize such a reanalysis, and such a reanalysis may take place only at laboratories certified by DHSS. If the reanalysis fails to reconfirm the presence of the drug or drug metabolite, the MRO shall cancel the test and report the reasons for the cancellation to the DOT.

(f) In situations in which the employer uses the split sample method of collection. If the employee requests an analysis of the split sample within 72 hours of having been informed of a verified positive test (or a longer period, if provided in a DOT agency regulation), the MRO shall direct, in writing, the laboratory to provide the split sample to another DHHS-certified laboratory for analysis. If the analysis of the split sample fails to reconfirm the presence of the drug(s) or drug metabolite(s) found in the primary specimen, or if the split sample is unavailable, inadequate for testing or untestable, the MRO shall cancel the test and report the reasons for the cancellation to the DOT.

(g) When the employer uses the split sample method of collection, the employee is not authorized to request a reanalysis of the primary sample as provided in paragraph (e) of this section.

* * * * *

6. A new § 40.41 is proposed to be added, to read as follows:

§ 40.41 Definitions.

The following definitions apply to this subpart:

Aliquot. A portion of a specimen used for testing.

Blind sample or blind performance test specimen. A urine specimen submitted to a laboratory for quality control testing purposes, with a fictitious identifier, so that the laboratory cannot distinguish it from employee specimens, and which is spiked with known quantities of specific drugs or which is blank, containing no drugs.

Canceled test. A test which has been declared invalid by a Medical Review Officer. A canceled test is neither a positive nor a negative test. For purposes of this part, a sample that has been rejected for testing by a laboratory is treated the same as a canceled test.

Chain of custody. Procedures to account for the integrity of each urine specimen by tracking its handling and storage from point of specimen collection to final disposition of the specimen. These procedures shall require that an appropriate drug testing custody form (see § 40.23(a)) be used from time of collection to receipt by the laboratory and that upon receipt by the laboratory an appropriate laboratory chain of custody form(s) account(s) for the sample or sample aliquots within the laboratory.

Collection container. A container into which the employee urinates to provide the urine sample used for a drug test.

Collection site. A place designated by the employer where individuals present themselves for the purpose of providing a specimen of their urine to be analyzed for the presence of drugs.

Collection site person. A person who instructs and assists individuals at a collection site and who receives and makes an initial examination of the urine specimen provided by those individuals.

Confirmatory test. A second analytical procedure to identify the presence of a specific drug or metabolite that is independent of the initial test and that uses a different technique and chemical principle from that of the initial test in order to ensure reliability and accuracy. (Gas chromatography/mass spectrometry (GC/MS) is the only authorized confirmation method for cocaine, marijuana, opiates, amphetamines, and phencyclidine.)

Initial test (also known as screening test). An immunoassay screen to eliminate "negative" urine specimens from further analysis.

Medical Review Officer (MRO). A licensed physician responsible for receiving laboratory results generated by an employer's drug testing program who has knowledge of substance abuse disorders and has appropriate medical

training to interpret and evaluate an individual's confirmed positive test result together with his or her medical history and any other relevant biomedical information.

Shipping container. A container capable of being secured with a tamper proof seal that is used for transfer of one or more urine specimen bottle(s) and associated documentation from the collection site to the laboratory.

Specimen bottle. The bottle which, after being labeled and sealed according to the procedures in this part, is used to transmit a urine sample to the laboratory.

7. A new subpart C is proposed to be added to part 40, to read as follows:

Subpart C—Alcohol Testing

40.51 The breath alcohol technician.
40.53 Devices to be used in alcohol testing.
40.55 The alcohol testing site.
40.57 The alcohol testing form.
40.59 Preparation for testing.
40.61 Administration of the initial test.
40.63 Administration of the confirmatory test.
40.65 Inability to provide an adequate amount of breath.
40.67 Invalid tests.
40.69 Availability and disclosure of alcohol testing information about individual employees.
40.71 Maintenance and disclosure of records concerning EBTs and BATs.
40.73 Definitions.
40.77–40.79 [Reserved]

Authority: 49 U.S.C. 102, 301, 322; 49 U.S.C. app. 1301nt, app. 1434nt., app. 2717, app. 1618a.

§ 40.51 The breath alcohol technician.

(a) The breath alcohol technician (BAT) shall be trained to proficiency in the operation of the evidential breath testing device (EBT) he or she is using and in the alcohol testing procedures of this part.

(1) Proficiency shall be demonstrated by successful completion of a course of instruction, which at a minimum, provides training in the principles of EBT methodology, operation, and calibration checks; the fundamentals of breath analysis for alcohol content; and the procedures required in this part for obtaining a breath specimen, and interpreting and recording EBT results.

(2) Courses of instruction that meet standards of the National Highway Traffic Safety Administration (NHTSA) model course or a course approved by a state department of health or other relevant state agency may be used to demonstrate BAT proficiency.

(3) The course of instruction shall include documentation that the BAT has demonstrated competence in the operation of the specific EBT he/she will use.

(4) Any BAT who will perform an external calibration check of an EBT shall be trained to proficiency in conducting the check on the particular model of EBT, to include practical experience and demonstrated competence in preparing the breath alcohol simulator or alcohol standard, and in maintenance and calibration of the EBT.

(5) The BAT shall receive additional training, as needed to ensure proficiency, concerning new or additional devices or changes in technology that he or she will use.

(6) The employer shall maintain documentation of the training and proficiency test of each BAT it uses to test employees, as provided in § 40.71.

(b) The supervisor of an employee shall not act as a BAT for that employee, unless doing so is not prohibited by applicable DOT agency alcohol testing regulations and no other BAT is available in a timely manner to perform the test.

§ 40.53 Devices to be used in alcohol testing.

(a) Employers shall use only EBTs meeting the requirements of this section for alcohol testing subject to this part.

(b) EBTs shall have the capability of providing, independently or directly linked to a separate printer, a printed result in triplicate (or three consecutive identical copies) of each breath test and of the operations specified in paragraphs (c) and (d) of this section.

(c) EBTs shall be capable of assigning a unique and sequential number to each completed test, with the number capable of being read by the BAT and the employee before each test and being printed out on each copy of the result.

(d) EBTs shall be able to distinguish alcohol from acetone at the 0.02 alcohol concentration level.

(e) EBTs shall be capable of the following operations prior to and following each collection of breath:

(1) Testing an air blank.

(2) Performing an external calibration check.

(f) In order to be used in alcohol testing subject to this part, an EBT shall have a quality assurance plan (QAP) developed by the manufacturer.

(1) The plan shall designate the method or methods to be used to perform external calibration checks of the device.

(2) The plan shall specify the minimum intervals for performing external calibration checks of the device. Intervals shall be specified for different frequencies of use, environmental conditions (*e.g.*, temperature, altitude, humidity), and contexts of operation (*e.g.*, stationary or mobile use).

(3) The plan shall specify the tolerances on an external calibration check within which the EBT is regarded to be in proper calibration.

(4) The plan shall specify inspection, maintenance, and calibration requirements and intervals for the device.

(5) For a plan to be regarded as valid for purposes of this paragraph, the manufacturer shall have submitted the plan to the National Highway Traffic Safety Administration (NHTSA) for review by NHTSA and have received NHTSA approval of the plan.

(g) The employer shall comply with the NHTSA-approved quality assurance plan for each EBT it uses for alcohol testing subject to this part.

(1) The employer shall ensure that external calibration checks of each EBT are performed as provided in the manufacturer's plan.

(2) The employer shall take an EBT out of service if any external calibration check results in a reading outside the tolerances for the EBT set forth in manufacturer's plan. The EBT shall not again be used for alcohol testing under this part until it has been serviced and has had an external calibration check resulting in a reading within the tolerances for the EBT.

(3) The employer shall ensure that inspection, maintenance, and calibration of each EBT are performed by the manufacturer or a maintenance representative certified by the device's manufacturer or a state health agency or other appropriate state agency. The employer shall also ensure that each BAT or other individual who performs an external calibration check of an EBT used for alcohol testing subject to this part has demonstrated proficiency in conducting such a check of the model of EBT in question.

(4) The employer shall maintain records of the external calibration checks of EBTs as provided in § 40.71.

(h) When the employer is not using the EBT at an alcohol testing site, the employer shall store the EBT in a secure space.

§ 40.55 The alcohol testing site.

(a) Each employer shall use an alcohol testing site that affords visual and aural privacy to the individual being tested. All necessary equipment, personnel, and materials for breath testing shall be provided at each site.

(b) An employer may use a mobile collection facility (*e.g.*, a van equipped for alcohol testing) as an alcohol testing site.

(c) The alcohol testing site shall be secured, and no unauthorized persons shall be permitted access to the alcohol testing site, at any time when testing is occurring or when the EBT remains unsecured within the alcohol testing site.

(d) In unusual circumstances (*e.g.*, when it is essential to conduct a test outdoors at the scene of an accident), a test may be conducted at a place other than an alcohol testing site. In such a case, the employer or BAT shall provide visual and aural privacy to the employee to the greatest extent practicable.

(e) The BAT shall supervise only one employee's use of the EBT at a time. The BAT shall not leave the alcohol testing site while the preparations for testing and testing of a given employee (as set forth in §§ 40.59 through 40.63) are in progress.

§ 40.57 The alcohol testing form.

(a) Each employer shall use the collection form prescribed under this part or a form generated by the EBT that provides all the information contained on the form. Employers may not modify or revise these forms.

(b) The form shall provide triplicate copies: one for the employee being tested, one for the BAT, and one for the employer.

§ 40.59 Preparation for testing.

(a) When the employee enters the alcohol testing site, the BAT will require him or her to provide positive identification (*e.g.*, through use of a photo I.D. card or identification by an employer representative). On request by the employee, the BAT shall provide positive identification to the employee.

(b) The BAT shall explain the testing procedure to the employee.

(c) The employee and BAT shall complete and date the alcohol testing form. Both the BAT and the employee shall sign the form, signifying that the employee is present and is providing breath and noting the number of the test that is about to be taken.

(d) Refusal by an employee to complete and sign the alcohol testing form, to provide breath, to provide an adequate amount of breath, or otherwise to cooperate with the collection process in a way that prevents the completion of the test, shall be noted by the BAT in the remarks section of the form. The collection process shall be terminated and the BAT shall immediately notify the employer of the termination.

(e) If an initial or confirmation test cannot be completed, or if an event occurs that would invalidate the test, the BAT shall, if practicable, begin a new initial or confirmation test, as applicable, using a new alcohol testing form with a new sequential test number.

§ 40.61 Administration of the initial test.

(a) Before the initial test is administered for each employee, the BAT shall ensure that the EBT registers 0.00 on an air blank. If the EBT reading is greater than 0.00, the BAT shall conduct one more air blank. If the EBT does not register 0.00 on that attempt, testing shall not proceed using that instrument. However, testing of the employee may continue using another EBT.

(b) An individually-sealed mouthpiece shall be opened in view of the employee and BAT and attached to the EBT in accordance with the manufacturer's instructions.

(c) The BAT shall instruct the employee to blow forcefully into the mouthpiece for at least 6 seconds or until the EBT indicates that an adequate amount of breath has been obtained.

(d) After the initial test is administered for each employee, the BAT shall run an air blank, after allowing adequate time for the EBT to clear any residual alcohol remaining from the test. If the EBT reading is greater than 0.00, the BAT shall conduct one more air blank. The employee's test is valid only if this check results in a 0.00 reading.

(e) Any EBT taken out of service because of failure to perform air blanks accurately shall not be used for testing until a check of external calibration is conducted and the EBT found to be within tolerance limits.

(f) If the result of the initial test is an alcohol concentration of less than 0.02, no further testing is authorized. The BAT shall transmit the result to the employer in a confidential manner, and the employer shall receive and store the information so as to ensure that confidentiality is maintained as required by § 40.69.

(g) If the result of the initial test is an alcohol concentration of 0.02 or greater, a confirmatory test shall be performed as provided in § 40.63.

(h) If the EBT does not print the results directly onto the form, the BAT shall affix the test result printout to the alcohol test form in the designated space, using a method that will provide clear evidence of removal (*e.g.*, tamper-evident tape). The BAT shall sign and date the printed result, certifying that the proper procedures were followed. The employee shall sign the printed result, certifying that he or she took the test with the sequential test number recorded on the printed result that matches the number on the EBT. If the employee declines to sign the printed result, it shall not be considered a refusal to be tested. In this event, the BAT shall note the refusal to sign in the "Remarks" section of the form.

(i) In the event the result displayed on the EBT does not match the printed result, the BAT shall note the disparity in the remarks section. Both the employee and the BAT shall initial or sign the notation. In accordance with § 40.67, the test is invalid and the employer and employee shall be so advised.

§ 40.63 Administration of the confirmatory test.

(a) The BAT shall instruct the employee not to eat, drink, put any object or substance in his or her mouth, and, to the extent possible, not belch during a waiting period before the confirmatory test. This time period begins with the completion of the initial test, and shall not be less than 15 minutes nor more than 20 minutes long. The BAT shall explain to the employee the reason for this requirement (*i.e.*, to prevent any accumulation of mouth alcohol from leading to an artificially high reading) and the fact that it is for the employee's benefit. The BAT shall also explain that the test will be conducted at the end of the waiting period, even if the employee has disregarded the instruction. If the BAT becomes aware that the employee has not complied with this instruction, the BAT shall so note in the "Remarks" section of the form.

(b) The BAT shall provide to the employee, and instruct the employee to read during the waiting period, a notice that should the confirmatory test result be an alcohol concentration of 0.04 or greater, the employee should not drive a motor vehicle or perform any safety-sensitive function. The employee shall initial the testing form in the space provided to indicate that this notice has been provided. If the employee declines to initial the form for this purpose, the BAT shall note the provision of the notice and the employee's refusal to initial in the "Remarks" section of the form.

(c) The procedures of § 40.61 (a), (c), (d), (e) and (i) shall be followed. A new mouthpiece shall be used for the confirmation test.

(d) In the event that the initial and confirmatory test results are not identical, the lower of the two results is deemed to be the final result upon which any action under operating administration rules shall be based.

(e) If the EBT does not print the results directly onto the form, the BAT shall affix the test result printout to the

alcohol test form in the designated space, using a method that will provide clear evidence of removal (*e.g.*, tamper-evident tape). The BAT shall sign and date the printed result, certifying that the proper procedures were followed. The employee shall sign the printed result, certifying that he or she took the test with the sequential test number recorded on the printed result that matches the number on the EBT. If the employee declines to sign the printed result, it shall not be considered a refusal to be tested. In this event, the BAT shall note the refusal to sign in the "Remarks" section of the form.

(f) The BAT shall transmit all results to the employer in a confidential manner.

(1) Each employer shall designate an employer representative for the purpose of receiving and handling alcohol testing results in a confidential manner. All communications by BATs to the employer concerning the alcohol testing results of employees shall be to the designated employer representative.

(2) Such transmission may be in writing, in person or by telephone or electronic means, but the BAT shall ensure immediate transmission to the employer of results that require the employer to prevent the employee from performing a safety-sensitive function.

(3) If the initial transmission is not in writing (*e.g.*, by telephone), the employer shall establish a mechanism to verify the identity of the BAT providing the information.

(4) If the initial transmission is not in writing, the BAT shall follow the initial transmission by providing to the employer the employer's copy of the alcohol testing form. The employer shall store the information so as to ensure that confidentiality is maintained as required by § 40.69 of this part.

§ 40.65 Inability to provide an adequate amount of breath.

(a) This section sets forth procedures to be followed in any case in which an employee is unable, or alleges that he or she is unable, to provide an amount of breath sufficient to permit a valid breath test because of a medical condition.

(b) The BAT shall again instruct the employee to attempt to provide an adequate amount of breath. If the employee refuses to make the attempt, the BAT shall immediately inform the employer.

(c) If the employee attempts and fails to provide an adequate amount of breath, the BAT shall so note in the "Remarks" section of the alcohol testing form and immediately inform the employer.

(d) The employer shall direct the employee to obtain, as soon as practical after the attempted provision of breath, an evaluation from a licensed physician who is acceptable to the employer concerning the employee's medical ability to provide an adequate amount of breath. The employee shall make available to the physician all relevant medical history and records.

(e) If the physician determines, in his or her reasonable medical judgment, that a medical condition has, or with a high degree of probability, could have, precluded the employee from providing an adequate amount of breath, the employee's failure to provide an adequate amount of breath shall not be deemed a refusal to take a test. The physician shall provide to the employer a written statement of the basis for his or her conclusion.

(f) If the licensed physician, in his or her reasonable medical judgment, is unable to make the determination set forth in paragraph (e) of this section, the employee's failure to provide an adequate amount of breath shall be regarded as a refusal to take a test. The licensed physician shall provide a written statement of the basis for his or her conclusion to the employer.

§ 40.67 Invalid tests.

An alcohol test shall be invalid under the following circumstances:

(a) The next external calibration check of the EBT produces a result that differs by more than the tolerance stated in the manufacturer's QAP from the known value of the test standard. In this event, every test performed on the device since the last valid external calibration check shall be invalidated;

(b) A device other than an EBT as described in § 40.53 is used for the test;

(c) The BAT does not observe the minimum 15 minute waiting period prior to the confirmatory test, as provided in § 40.61 (a);

(d) The BAT does not perform an air blank of the EBT before and after an initial or confirmatory test, or an air blank does not result in a reading of 0.00 prior to or after the administration of the test, as provided in §§ 40.63 and 40.65;

(e) The BAT does not sign the form as required by §§ 40.61 and 40.63;

(f) The employee has failed to sign the form following the printing on or attachment to the form of the test result, and the BAT has failed to note this event on the remarks section of the form.

(g) The EBT fails to print the result;

(h) The sequential test number on the EBT is not the same as the sequential test number on the printed result; or

(i) The alcohol concentration displayed on the EBT is inconsistent with the alcohol concentration printed on the result.

§ 40.69 Availability and disclosure of alcohol testing information about individual employees.

(a) Except as provided in this section, employers shall release information or copies of records regarding an employee's alcohol test results to a third party only as directed by specific, written instruction of the employee authorizing the release of the information or records to an identified person.

(b) Employers shall maintain records in a secure manner, so that disclosure of information to unauthorized persons does not occur.

(c) Employers may disclose information related to an alcohol test of an individual to the individual, the decisionmaker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the individual, or by a DOT agency against the individual, and arising from a positive alcohol test (including but not limited to a worker's compensation, unemployment compensation, equitable relief or monetary damages, or other proceeding relating to a benefit sought by the employee).

(d) On request of the National Transportation Safety Board (NTSB), employers shall disclose to the NTSB information about any post-accident test of an employee that was performed following the accident under NTSB investigation.

(e) Employers shall make available copies of all results of employer alcohol testing programs, and any other records pertaining to alcohol testing programs, when requested by DOT or any DOT agency with regulatory authority over the employer or any of its employees.

(f) A covered employee shall, upon written request, be entitled to be provided any records relating to his or her test. The employer shall promptly provide the records requested by the employee. Assignment of costs for such records shall be made in accordance with employer/employee agreements. Access to such records shall not be contingent on the employee obtaining or paying for records in addition to those specifically requested.

§ 40.71 Maintenance and disclosure of records concerning EBTs and BATs.

(a) Each employer shall maintain the following records for five years:

(1) Records of the inspection, maintenance, and calibration of each EBT used in employee testing;

(2) Documentation of the employer's compliance with the quality assurance plan of the manufacturer of each EBT it uses for alcohol testing under this part, including records of the results of external calibration checks;

(3) Records of the training and proficiency testing of each BAT used in employee testing.

(b) Records required to be maintained by this section shall be disclosed as follows:

(1) Employers shall make available copies of all such records, upon request, to DOT or any DOT agency with regulatory authority over the employer or employee.

(2) Employers shall make available, on the request of any covered employee who has been tested, any such record that relates to a test which the employee has taken. The employer shall promptly provide the records requested by the employee. Assignment of costs for such records shall be made in accordance with employer/employee agreements. Access to such records shall not be contingent on the employee obtaining or paying for records in addition to those specifically requested.

(3) Employers shall make available to the NTSB, on request, any such record that directly pertains to a post-accident test of an employee that was performed following an accident under NTSB investigation.

(4) Employers may disclose records covered by this section to the individual, the decisionmaker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the individual, or by a DOT agency against the individual, and arising from a positive alcohol test (including but not limited to a worker's compensation, unemployment compensation, equitable relief or monetary damages, or other proceeding relating to a benefit sought by the employee).

§ 40.73 Definitions.

The following definitions apply to this subpart:

Air blank. A reading by an EBT of ambient air containing no alcohol.

Alcohol. Ethyl alcohol (ethanol). References to the use of alcohol include use of any beverage, mixture, or preparation containing ethyl alcohol (including any medication).

Alcohol concentration. The alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by an evidential breath test under this part. When the indicated alcohol concentration of a covered employee on an initial alcohol test is different from an indicated alcohol concentration on a confirmatory test, the employee shall be considered to have the lower indicated concentration.

Alcohol testing site. The location designated by the employer at which employees are required to provide breath.

Breath Alcohol Technician (BAT). An individual who instructs and assists individuals in the testing process and operates the evidential breath testing device.

Confirmatory test. An analysis of a second, separate amount of breath on an evidential breath testing device.

Evidential breath testing device (EBT). A breath testing device approved by the National Highway Traffic Safety Administration (NHTSA) for the evidential testing of breath and placed on NHTSA's "conforming products list of evidential breath measurement devices."

Initial test. The first analysis of an amount of breath on an evidential breath testing device.

Invalid test. A test which has been declared invalid. It is neither a positive nor a negative test.

§§ 40.73–40.79 [Reserved]

8 and 9. A new subpart D is proposed to be added to part 40 to read as follows:

Subpart D—Management Information System

Sec.

40.81 Reporting drug testing information to the Department of Transportation
40.83 Reporting alcohol testing information to the Department of Transportation

Subpart D—Management Information System

§ 40.81 Reporting drug testing information to the Department of Transportation.

(a) Employers shall maintain the drug testing program data identified in this section as specified in the appropriate DOT Agency drug testing rule. This data shall be submitted to each DOT Agency which regulates the employer as stipulated in the DOT Agency rule. DOT Agencies may require additional data necessary to evaluate the effectiveness of the drug testing rules. Any additional requirements are specified in the DOT Agency rules which regulate the employer. Data shall normally be compiled for the calendar year (starting January 1, 1993). If the rule is effective after January 1, 1993, reports for the first year should begin as of the rule's effective date. Annual reports shall be submitted no later than February 15 of the year following the year to which the data pertain.

(b) Each employer's report shall include each of the following data elements:

(1) Number of covered employees by employee category.

(2) Number of covered employees subject to testing under the anti-drug rules of more than one DOT Agency, identified by each agency.

(3) Number of specimens collected by type of test (i.e., pre-employment, periodic, random, etc.) and employee category.

(4) Number of positives verified by a Medical Review Officer (MRO) by type of test, type of drug and employee category.

(5) Number of negatives verified by a MRO by type of test, and employer category.

(6) Number of persons denied a position as a covered employee following a verified drug test.

(7) Number of covered employees verified positive by a MRO who were returned to duty in covered positions during the reporting period.

(8) Number of employees with tests verified positive by a MRO for multiple drugs.

(9) Number of covered employees who refused to submit to a drug test required under this rule, and the action taken in response to the refusal(s).

(10) Number of covered employees and supervisors who have received required training during the reporting period.

(c) The data shall be submitted on the form specified in Appendix B to this part or as amended by a DOT Agency rule. If the governing DOT Agency rule requires additional information or modifications authorized by this rule, appropriate modifications to the form will appear in the DOT Agency rule. Modification could include authorized additions and deletions.

§ 40.83 Reporting alcohol testing information to the Department of Transportation.

(a) Each employer shall submit to each DOT agency to whose alcohol testing rules it is subject an annual report covering the calendar year, summarizing the results of its alcohol misuse prevention program.

(b) Each employer that is subject to more than one DOT agency alcohol rule shall identify each employee covered by the regulations of more than one DOT agency. The identification will be by the total number and category of covered function. Prior to conducting any alcohol test on a covered employee subject to the rules of more than one DOT agency, the employer shall determine which DOT agency rule or rules authorizes or requires the test. The test result information shall be directed to the appropriate DOT agency or agencies.

(c) Each employer shall ensure the accuracy and timeliness of each report submitted by the employer or a consortium or other agent.

(d) Each employer shall submit the required annual report(s) no later than February 15 of each year. The report shall be submitted on the form specified by the DOT agency. Each report shall contain:

(1) Number of covered employees by employee category.

(2) Number of covered employees subject to testing under the alcohol misuse rule of another DOT agency, identified by each agency.

(3)(i) Number of initial tests by type of test and employee category.

(ii) Number of confirmatory tests, by type of test and employee category.

(4) Number of confirmatory alcohol tests indicating an alcohol concentration of .04 or greater, by type of test and employee category.

(5) Number of confirmatory alcohol tests indicating an alcohol concentration of .02 or greater but less than .04.

(6) Number of persons denied a position as a covered employee following a preemployment/pre-duty alcohol test indicating an alcohol concentration of .04 or greater.

(7) Number of covered employees with a confirmatory alcohol test indicating an alcohol concentration of .04 or greater who were returned to duty in covered positions (having complied with the recommendations of a substance abuse professional as described in DOT agency regulations).

(8) Number of covered employees who were administered alcohol and drug tests at the same time, with both a positive and drug test result and an alcohol test result indicating an alcohol concentration of .04 or greater.

(9) Number of covered employees who were found to have violated other provisions of DOT agency regulations, and the action taken in response to the violation.

(10) Number of covered employees who refused to submit to an alcohol test required under this part, and the actions taken in response to the refusal.

(11) Number of supervisors who have received training during the reporting period in determining the existence of reasonable suspicion of alcohol misuse.

10. A new appendix B is proposed to be added to part 40, to read as follows:

BILLING CODE 4910-62-M

APPENDIX B - DRUG AND ALCOHOL TESTING MIS DATA COLLECTION FORM

GENERAL INSTRUCTIONS

This reporting form includes three parts. Collectively, these parts address the data elements required in the U.S. Department of Transportation (DOT) drug and alcohol testing regulations. Each part of the form is preceded by instructions which outline and explain the information requested and indicate the probable sources for this information. The three parts of the form are:

Section	Instructions Pages	Reporting Form Pages
I. ORGANIZATIONAL INFORMATION	i-ii	1-2
II. DRUG TESTING INFORMATION	iii-vii	3-9
III. ALCOHOL TESTING INFORMATION	viii-xii	10-14

I. ORGANIZATIONAL INFORMATION

INSTRUCTIONS

This part of the reporting form includes two sections. These sections, the page number for the instructions, and the page location on the reporting form are:

Section	Instructions Page	Reporting Form Page
A. TRANSPORTATION EMPLOYER INFORMATION	i	1
B. COVERED EMPLOYEES	ii	2

Page 1 **TRANSPORTATION EMPLOYER INFORMATION** (Section A) requires the company name for which the report is done and a current address. Below this, a signature and date are required certifying the correctness and completeness of the form.

Page 2

COVERED EMPLOYEES (Section B) requires a count for each employee category that must be tested under DOT regulations. Each operating administration will specify the categories to be used for reports submitted to it. The most likely source for this information is the employer's personnel department. These counts should be based on the company records for the reported year. The **TOTAL** is a count of **all** covered employees for **all** categories combined, i.e., the sum of the columns.

Additional information must be completed if your company employs personnel who perform duties covered by the drug and alcohol rules of more than one DOT operating administration. **NUMBER OF EMPLOYEES COVERED BY MORE THAN ONE DOT OPERATING ADMINISTRATION**, requires that you identify the number of employees in each employee category under the appropriate additional operating administration(s)

For Office Use Only

DOT DRUG AND ALCOHOL TESTING MIS DATA COLLECTION FORM

YEAR COVERED BY THIS REPORT: 19___

A. TRANSPORTATION EMPLOYER INFORMATION

Company _____

Address _____

_____

_____

I, the undersigned, certify the attached United States Department of Transportation Drug and Alcohol Testing Management Information System Data Collection Form is, to the best of my knowledge and belief, a true, correct, and complete form for the period stated.

_____
Signature

_____
Title

_____
Date of Signature

Title 18, U.S.C. Section 1001, makes it a criminal offense subject to a maximum fine of $10,000, or imprisonment for not more than 5 years, or both, to knowingly and willfully make or cause to be made any false or fraudulent statements or representations in any matter within the jurisdiction of any agency of the United States.

B. COVERED EMPLOYEES

COVERED EMPLOYEES							
EMPLOYEE CATEGORY	NUMBER OF COVERED EMPLOYEES	NUMBER OF EMPLOYEES COVERED BY MORE THAN ONE DOT OPERATING ADMINISTRATION					
		FAA	FHWA	FRA	FTA	RSPA	USCG
TOTAL							

II. DRUG TESTING INFORMATION

INSTRUCTIONS

The following instructions are to be used as a guide for completing the drug testing information in the U.S. Department of Transportation (DOT) **Drug and Alcohol Testing Management Information System Data Collection Form.** These instructions outline and explain the information requested and indicate probable sources for this information. A sample testing results table with a narrative explanation is provided on pages iv-vi as an example to facilitate the process of completing the form correctly.

This part of the reporting form includes four sections. These sections address the data elements required in the regulations. These sections, the page number for the instructions, and the page location on the reporting form are:

Section	Instructions Page	Reporting Form Page
A. JOB APPLICANT TESTING INFORMATION	iv	4
B. EMPLOYEE TESTING	vi	5-7
C. OTHER TESTING/PROGRAM INFORMATION	vi	8
D. TRAINING/EDUCATION	vii	9

Sections A and B are used to summarize the drug testing results for covered employees. There are six tables to be completed (one in Section A and five in Section B). The first table (Section A) is where you enter the data on pre-employment testing. The five tables in Section B are for entering drug testing data on periodic, random, post-accident, reasonable cause, and return to duty testing, respectively. Items necessary to complete these tables include:

1) the number of specimens collected in each employee category;
2) the number of specimens tested which were verified negative and verified positive for any drug(s); and
3) individual counts of those specimens which were verified positive for each of the five drugs.

Do not include results of quality control (QC) samples submitted to the testing laboratory in any of the tables.

A sample table with detailed instructions is provided for Section A, **JOB APPLICANT TESTING INFORMATION**. The format and explanations used for the sample table apply to all six of the tables in Sections A and B.

Information on actions taken with those persons testing positive is required at the end of both Sections A and B. Specific instructions for providing this latter information are given after the instructions for completing the tables in Sections A and B.

Page 4

JOB APPLICANT TESTING INFORMATION (Section A) requires information for pre-employment testing. All numbers entered into this table should be separated into the category of employment for which the applicant was applying. A sample table with example numbers is presented on page v.

Three types of information are necessary to complete the left side of this table. The first blank column with the heading "**NUMBER OF SPECIMENS COLLECTED,**" requires a count for all collected specimens by employee category. It should not include refusals to test. The second blank column with the heading "**NUMBER OF SPECIMENS VERIFIED NEGATIVE,**" requires a count for all completed tests by employee category that were verified negative by your Medical Review Officer (MRO).

The third blank column with the heading "**NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS,**" refers to the number of specimens provided by job applicants that were verified positive. "Verified positive" means the results were verified by your MRO.

The right hand portion of this table, with the heading "**NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG,**" requires counts of positive tests **for each** of the five drugs for which tests were done, i.e., marijuana (THC), cocaine, phencyclidine (PCP), opiates, and amphetamines. The number of specimens positive for each drug should be entered in the appropriate column for that drug type. Again, "verified positive" refers to test results verified by your MRO.

If an applicant tested positive for more than one drug; for example, both marijuana and cocaine, that person's positive results would be included once in each of the appropriate columns (marijuana and cocaine).

Each column in the table should be added and the answer entered in the row marked "**TOTAL**".

A sample table is provided on page v with example numbers.

Page 4

Below the table for pre-employment testing information is a box with the heading "**Number of persons denied a position as a covered employee following a verified positive drug test**". This is simply a count of those persons who were not placed in a covered position because they tested positive for one or more drugs.

SAMPLE APPLICANT TEST RESULTS TABLE

The following example is for Section A, **JOB APPLICANT TESTING INFORMATION**, which summarizes pre-employment testing results. The procedures detailed here also apply to the tables in Section B which require you to summarize testing results for employees. Each operating administration will specify the employee categories to be used in reports submitted to it. This example will use the categories "Operator" and "Maintenance" to illustrate the procedures for completing the form.

A Urine specimens were collected for 157 job applicants for operator positions during the reporting year. This information is entered in the first blank column of the table in the row marked "Operator".

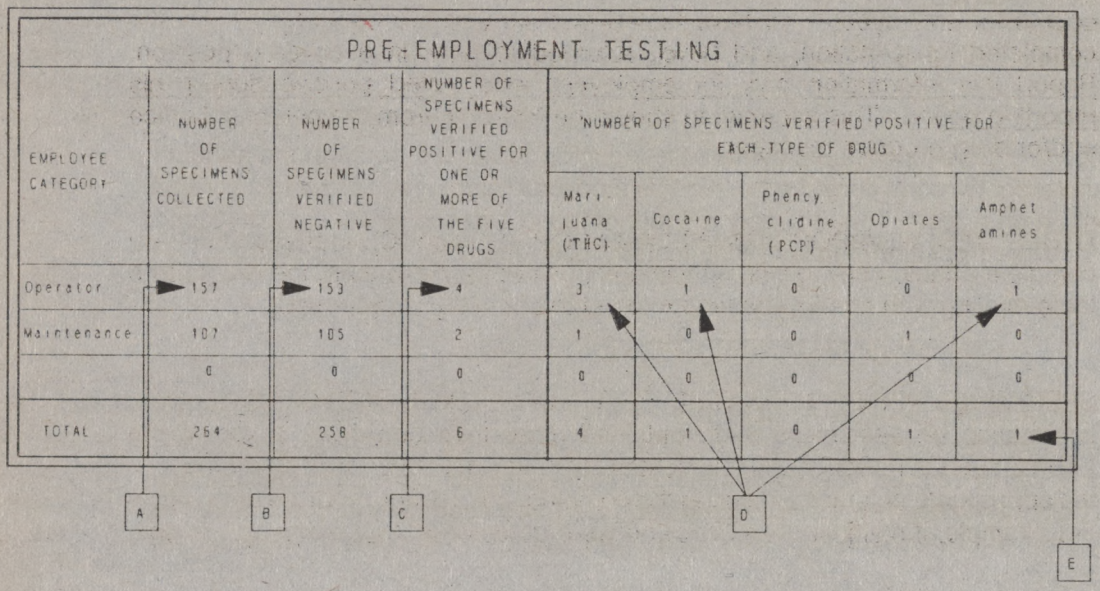
B The Medical Review Officer (MRO) for your company reported that 153 of those 157 specimens from applicants for operator positions were negative (i.e., no drugs were detected). Enter this information in the second blank column of the table in the row marked "Operator".

C The MRO for your company reported that 4 of those 157 specimens from applicants for operator positions were positive (i.e., a drug or drugs were detected). Enter this information in the third blank column of the table in the row marked "Operator".

D With the 4 specimens that tested positive, the following drugs were detected:

Specimen	Drugs
#1	Marijuana
#2	Amphetamines
#3	Marijuana and Cocaine (Multi-drug specimen)
#4	Marijuana

Marijuana was detected in three (3) specimens, cocaine in one (1), and amphetamines in one (1). This information is entered in the columns on the right hand side of the table under each of these drugs. Since two different drugs were detected in specimen #3 (multi-drug), entries are made in both the marijuana and the cocaine columns for this specimen. Information on multi-drug specimens must also be entered in Section C, **OTHER TESTING/PROGRAM INFORMATION**, on page 8 of the reporting form.



Please note that the sample data collection form also has information for maintenance workers on line two. The same procedures outlined for operators should be followed for entering the data on maintenance workers. With applicants for maintenance positions, 107 specimens were collected resulting in 105 verified negatives and 2 verified positives -- 1 for marijuana and 1 for opiates. This information is entered in the row marked "Maintenance".

E

The last row, marked "TOTAL", requires you to add the numbers in each of the columns. With this example, 157 specimens from applicants for operator positions were collected and 107 for applicants for maintenance positions. The total for that column would be 264 (i.e., 157+107). The same procedure should be used for each column, i.e., add all the numbers in that column and place the answer in the last row.

Note that adding up the numbers for each type of drug in a row ("NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG") will not always match the number entered in the third column, "NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS". The total for the numbers on the right hand side of the table may differ from the number of specimens testing positive since some specimens may contain more than one drug.

Remember that the same procedures indicated above are to be used for completing all of the tables in Sections A and B.

Pages 5-7 **EMPLOYEE TESTING** (Section B), as indicated, requires information for company employees in **covered positions** only. A separate table must be completed for each category of test. These categories include: (1) periodic, (2) random, (3) post-accident, (4) reasonable cause, and (5) return to duty testing. These tables are to be filled out like the sample table above. Again, these numbers **do not** include refusals for testing.

Page 7 Following these tables that summarize **EMPLOYEE TESTING**, you must provide counts for employees who have tested positive and are currently in, or have completed rehabilitation, and have returned to work in a covered position. Report this information only for employees who tested positive during this reporting period. This information should be available from the personnel office and/or drug program manager.

Page 8 **OTHER TESTING/PROGRAM INFORMATION** (Section C) requires that you complete a table dealing with specimens positive for more than one drug and a table dealing with employees who refused to submit to a drug test.

Page 8 **SPECIMENS VERIFIED POSITIVE FOR MORE THAN ONE DRUG** requires information on specimens that contained more than one drug. Indicate the **EMPLOYEE CATEGORY** and the **NUMBER OF VERIFIED POSITIVES**, then check the appropriate columns indicating the combination of drugs reported as positive. For example, if marijuana and cocaine were detected in 3 operator specimens,

then you would write "Operator" as the employee category, "3" as the number of verified positives, and "3" in the columns for "Marijuana" and "Cocaine". If marijuana and opiates were detected in 2 operator specimens, then you would write "Operator" as the employee category, "2" as the number of verified positives, and "2" in the columns for "Marijuana" and "Opiates".

Page 8

EMPLOYEES WHO REFUSED TO SUBMIT TO A DRUG TEST requires information on the **NUMBER OF COVERED EMPLOYEES** who refused to submit to a drug test required under this regulation, and a description of the **ACTION TAKEN** in response to the refusal. An example of an action taken would be "removed from covered duties pending termination".

Page 9

TRAINING/EDUCATION (Section D) requires information on the number of covered employees and supervisory personnel who have received the required drug training during the current reporting period.

READ BEFORE COMPLETING THE REMAINDER OF THIS FORM:

1. All items refer to the **current** reporting period **only** (for example, January 1, 1993 - December 31, 1993).

2. This report is only for testing **REQUIRED BY THE U.S. DEPARTMENT OF TRANSPORTATION (DOT)**:

   - Results should be reported only for employees in **COVERED POSITIONS** as defined by DOT drug testing regulations.

   - The information requested should only include testing for marijuana (THC), cocaine, phencyclidine (PCP), opiates, and amphetamines using the standard procedures required by DOT regulation 49 CFR Part 40.

3. Information on refusals for testing should only be reported in Section C ("OTHER TESTING/PROGRAM INFORMATION"). Do not include refusals for testing in other sections of this report.

4. Do not include the results of any quality control (QC) samples submitted to the testing laboratory in any of the tables.

5. Complete all items; DO NOT LEAVE ANY ITEM BLANK. If the value for an item is zero (0), place a zero (0) on the form.

This part of the form requires information on VERIFIED POSITIVE and VERIFIED NEGATIVE drug tests. These are the results that are reported to you by your Medical Review Officer (MRO).

A. JOB APPLICANT TESTING INFORMATION

PRE-EMPLOYMENT TESTING								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
TOTAL								

Number of persons denied a position as a covered employee following a verified positive drug test: ____

B. EMPLOYEE TESTING

PERIODIC TESTING								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
TOTAL								

RANDOM TESTING								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
TOTAL								

B. EMPLOYEE TESTING (continued)

POST-ACCIDENT TESTING

EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
TOTAL								

REASONABLE CAUSE TESTING

EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
TOTAL								

B. EMPLOYEE TESTING (continued)

RETURN TO DUTY TESTING								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
TOTAL								

Number of employees, currently in or having completed rehabilitation or otherwise qualified to return to duty, who have returned to work in a covered position during this reporting period: ____

C. OTHER TESTING/PROGRAM INFORMATION

SPECIMENS VERIFIED POSITIVE FOR MORE THAN ONE DRUG						
EMPLOYEE CATEGORY	NUMBER OF VERIFIED POSITIVES	Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines

EMPLOYEES WHO REFUSED TO SUBMIT TO A DRUG TEST	
NUMBER OF COVERED EMPLOYEES	ACTION TAKEN

D. TRAINING/EDUCATION

Training During Current Reporting Period

Number of covered employees who have received initial training on the consequences, manifestations, and behavioral cues of drug use as required by DOT drug testing regulations: [ ]

Number of supervisory personnel who have received initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable drug use as required by DOT drug testing regulations: [ ]

Number of covered employees who have received recurrent or refresher training on the consequences, manifestations, and behavioral cues of drug use: [ ]

Number of supervisory personnel who have received recurrent or refresher training on the specific contemporaneous physical, behavioral, and performance indicators of probable drug use: [ ]

III. ALCOHOL TESTING INFORMATION

INSTRUCTIONS

The following instructions are to be used as a guide for completing the alcohol testing information for the U.S. Department of Transportation (DOT) **Drug and Alcohol Testing Management Information System Data Collection Form**. These instructions outline and explain the information requested and indicate probable sources for this information. A sample testing results table with a narrative explanation is provided on pages ix-x as an example to facilitate the process of completing the form correctly.

This part of the reporting form includes four sections. These sections address the data elements required in the regulations. These sections, the page number for the instructions, and the page location on the reporting form are:

Section	Instructions Page	Reporting Form Page
A. JOB APPLICANT TESTING INFORMATION	ix	10
B. EMPLOYEE TESTING	xi	11-13
C. OTHER TESTING/PROGRAM INFORMATION	xi	13-14
D. TRAINING/EDUCATION	xii	14

Sections A and B are used to summarize the alcohol testing results for covered employees. There are six tables to be completed (one in Section A and five in Section B). The first table (Section A) is where you enter the data on pre-employment/pre-duty testing. The five tables in Section B are for entering alcohol testing data for random, post-accident, reasonable suspicion, return to duty, and follow-up testing, respectively. Items necessary to complete these tables include:

1) the number of initial alcohol tests performed for each employee category;
2) the number of confirmatory alcohol tests performed for each employee category;
3) the number of confirmatory test results which were equal to or greater than 0.04; and
4) the number of confirmatory test results which were equal to or greater than 0.02, but less than 0.04.

A sample table with detailed instructions is provided for Section A, **JOB APPLICANT TESTING INFORMATION**. The format and explanations used for the sample table apply to all six of the tables in Sections A and B.

Information on actions taken with those persons whose alcohol test results were 0.04 or greater is required at the end of both Sections A and B. Specific instructions for providing this latter information are given after the instructions for completing the tables in Sections A and B.

Page 10

JOB APPLICANT TESTING INFORMATION (Section A) requires information for pre-employment/pre-duty testing. All numbers entered into this table should be separated into the category of employment for which the applicant was applying. A sample table with example numbers is presented on page x.

Four types of information are necessary to complete the left side of this table. The first blank column with the heading "**NUMBER OF INITIAL TESTS**" requires a count of all initial alcohol tests performed for each employee category. It should not include refusals to test. The second blank column with the heading "**NUMBER OF CONFIRMATORY TESTS**" requires a count of all confirmatory alcohol tests performed for each employee category.

The third blank column with the heading "**NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04**" requires a count for each employee category.

The fourth blank column with the heading "**NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04**" requires a count for each employee category.

Each column in the table should be added and the answer entered in the row marked "**TOTAL**".

A sample table is provided on page x with example numbers.

Page 10

Below the table for pre-employment testing information is a box with the heading "**Number of persons denied a position as a covered employee following a pre-employment/pre-duty alcohol test indicating an alcohol concentration of 0.04 or greater**". Enter the appropriate number in the box provided.

SAMPLE APPLICANT TEST RESULTS TABLE

The following example is for Section A, **JOB APPLICANT TESTING INFORMATION**, which summarizes pre-employment/pre-duty testing results. The procedures detailed here also apply to the tables in Section B which require you to summarize testing results for employees. Each operating administration will specify the employee categories to be used in reports submitted to it. This example will use the categories "Operator" and "Maintenance" to illustrate the procedures for completing the form.

A

Initial tests were performed on 157 job applicants for operator positions during the reporting year. This information is entered in the first blank column of the table in the row marked "Operator".

B

Confirmatory tests were necessary for 6 of the 157 applicants for operator positions. Enter this information in the second blank column of the table in the row marked "Operator". The confirmatory test results for these 6 applicants were the following:

Applicant	Confirmation Result
#1	0.06
#2	0.01
#3	0.11
#4	0.04
#5	0.03
#6	0.02

C The confirmatory test results for 3 of the applicants for operator positions were equal to or greater than 0.04. Enter this information in the third blank column of the table in the row marked "Operator".

D The confirmatory test results for 2 of the applicants for operator positions were equal to or greater than 0.02, but less than 0.04. Enter this information in the fourth blank column of the table in the row marked "Operator".

E The last row, marked "TOTAL", requires you to add the numbers in each of the columns. With this example, 157 applicants for operator positions and 107 applicants for maintenance positions were subjected to initial tests. The total for that column would be 264 (i.e., 157 + 107). The same procedure should be used for each column (i.e., add all the numbers in that column and place the answer in the last row).

PRE-EMPLOYMENT/PRE-DUTY TESTING

EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Operator	157	5	3	2
Maintenance	107	3	1	0
	0	0	0	0
TOTAL	264	8	4	2

A B C D E

Please note that our sample data collection form also has information for maintenance workers on line two. The same procedures outlined for operators should be followed for entering the data on maintenance workers. With applicants for maintenance positions, 107 initial tests were conducted resulting in 3 confirmatory tests. The confirmatory test result for 1 of the maintenance worker applicants was equal to or greater than 0.04; no results were equal to or greater than 0.02, but less than 0.04. This information is entered in the row marked "Maintenance".

Note that adding up the numbers for confirmation results in columns three and four will not always match the number entered in the second column, "NUMBER OF CONFIRMATORY TESTS". These numbers may differ since some confirmatory test results may be less than 0.02.

Remember that the same procedures indicated above are to be used for completing all of the tables in Sections A and B.

Pages 11-13 **EMPLOYEE TESTING** (Section B), as indicated, requires information for company employees in **covered positions** only. A separate table must be completed for each category of test. These categories include: (1) random, (2) post-accident, (3) reasonable suspicion, (4) return to duty, and (5) follow-up testing. These tables are to be filled out like the sample table above. Again, these numbers **do not** include refusals for testing.

Page 12 Following the table that summarizes return to duty testing, you must provide a count of the **"Number of employees with a confirmatory alcohol test indicating an alcohol concentration of 0.04 or greater who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in DOT regulations)"**. Report this information only for employees who were tested during this reporting period. This information should be available from the personnel office and/or alcohol program manager.

Pages 13-14 **OTHER TESTING/PROGRAM INFORMATION** (Section C) requires that you provide information on employees who tested positive for drugs and alcohol (at the same time), information on violations of other alcohol provisions (not necessarily resulting in positive alcohol tests), and information on employees who refused to submit to an alcohol test.

Page 13 **Number of employees administered drug and alcohol tests at the same time resulting in a verified positive drug test and an alcohol test indicating an alcohol concentration of 0.04 or greater**, requires that a count of all such employees be entered in the indicated box.

Page 13 **VIOLATIONS OF OTHER ALCOHOL PROVISIONS/PROHIBITIONS OF THIS REGULATION**, requires information on the **NUMBER OF COVERED EMPLOYEES** committing such a violation, a description of the **VIOLATION** committed (e.g., pre-duty alcohol use, on duty alcohol use, on duty alcohol possession), and a description of the **ACTION TAKEN** in response to the violation.

Page 14 **EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST** requires information on the **NUMBER OF COVERED EMPLOYEES** who refused to submit to an alcohol test as required under this regulation, and a description of the **ACTION TAKEN** in response to the refusal.

Page 14 **TRAINING/EDUCATION** (Section D) requires information on the number of supervisory personnel who have received the required alcohol training during the current reporting period.

READ BEFORE COMPLETING THE REMAINDER OF THIS FORM:

1. All items refer to the **current** reporting period **only** (for example, January 1, 1993 - December 31, 1993).

2. This report is only for testing **REQUIRED BY THE U.S. DEPARTMENT OF TRANSPORTATION (DOT)**:

   - Results should be reported only for employees in **COVERED POSITIONS** as defined by DOT alcohol testing regulations.

   - The information requested should only include testing for alcohol using the standard procedures required by DOT regulation 49 CFR Part 40.

3. Information on refusals for testing should only be reported in Section C ("OTHER TESTING/PROGRAM INFORMATION"). Do not include refusals for testing in other sections of this part of the report.

4. Complete all items; DO NOT LEAVE ANY ITEM BLANK. If the value for an item is zero (0), place a zero (0) on the form.

A. JOB APPLICANT TESTING INFORMATION

PRE-EMPLOYMENT/PRE-DUTY TESTING				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
TOTAL				

Number of persons denied a position as a covered employee following a pre-employment/pre-duty alcohol test indicating an alcohol concentration of 0.04 or greater: [ ]

B. EMPLOYEE TESTING

RANDOM TESTING				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
TOTAL				

POST-ACCIDENT TESTING				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
TOTAL				

B. EMPLOYEE TESTING (continued)

REASONABLE SUSPICION TESTING				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
TOTAL				

RETURN TO DUTY TESTING				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
TOTAL				

Number of employees with a confirmatory alcohol test indicating an alcohol concentration of 0.04 or greater who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in DOT regulations): [ ]

B. EMPLOYEE TESTING (continued)

FOLLOW-UP TESTING				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
TOTAL				

C. OTHER TESTING/ PROGRAM INFORMATION

Number of employees administered drug and alcohol tests at the same time resulting in a verified positive drug test and an alcohol test indicating an alcohol concentration of 0.04 or greater: ☐

VIOLATIONS OF OTHER ALCOHOL PROVISIONS/PROHIBITIONS OF THIS REGULATION		
NUMBER OF COVERED EMPLOYEES	VIOLATION	ACTION TAKEN

C. OTHER TESTING/PROGRAM INFORMATION (continued)

EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST	
NUMBER OF COVERED EMPLOYEES	ACTION TAKEN

D. TRAINING/EDUCATION

Training During Current Reporting Period

Number of supervisors who have received the required training in determining the existence of reasonable suspicion of alcohol misuse: [ ]

[FR Doc. 92-29674 Filed 12-10-92; 10:00 am]

BILLING CODE 4910-62-C

federal register

Tuesday
December 15, 1992

Part III

Department of Transportation

Federal Aviation Administration

14 CFR Part 61, et al.
Drug and Alcohol Testing Programs; Proposed Rules

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 61, 63, 65, 121 and 135

[Docket No. 27065; Notice No. 92–17]

RIN: 2120–AE43

Alcohol Misuse Prevention Program for Personnel Engaged in Specified Aviation Activities

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This notice proposes regulations to establish an alcohol testing program for air carrier employees who perform safety-sensitive duties, which would implement the FAA-related provisions of the Omnibus Transportation Employee Testing Act of 1991, which was enacted on October 28, 1991. As proposed in this NPRM, employees who perform safety-sensitive duties directly or by contract for aviation employers that hold a certificate issued under certain regulatory provisions, operators as defined in the regulations, or air traffic control facilities not operated by the FAA or the U.S. military would have to be subject to an FAA-approved alcohol misuse prevention program (AMPP). The proposed rule would require alcohol testing of these employees, proscribe certain alcohol-related conduct, and establish specified consequences for engaging in alcohol misuse. Employers would also be required to provide written materials to covered employees explaining the program and to submit reports to the FAA on the results of the program. This proposed rule is intended to ensure that public safety is maintained by preventing alcohol misuse by safety-sensitive aviation employees.

DATES: Comments must be received on or before April 14, 1993. There will be public hearings on this proposal, details about which will be published in the **Federal Register.**

ADDRESSES: Comments on this notice should be mailed, in triplicate, to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rules Docket (AGC–10), Docket No. 27065, 800 Independence Avenue SW., Washington, DC 20591. Comments that are delivered to this address must be marked "Docket No. 27065." Comments may be examined in room 915G between 8:30 a.m. and 5 p.m. on weekdays, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Ms. Julie B. Murdoch, Office of Aviation Medicine, Drug Abatement Division (AAM–800), Federal Aviation Administration, 400 7th Street SW., Washington, DC 20590; telephone (202) 366–6710.

SUPPLEMENTARY INFORMATION:

Availability of NPRM

Any person may obtain a copy of this NPRM by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attn: Public Inquiry Center (APA-230), 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267–3484. Requests must include the notice number of this NPRM.

Persons interested in being placed on a mailing list for future rulemaking actions should request a copy of Advisory Circular 11-2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedures.

Current Laws and Regulations

A variety of laws and regulations currently restrict the consumption of alcohol by some aviation employees. Federal criminal law prohibits any person from operating or directing the operation of a common carrier while under the influence of alcohol. 18 U.S.C. 342. A blood alcohol level of .10 percent is considered presumptive evidence that the person is under the influence. 18 U.S.C. 343(1).

The FAA's regulations concerning alcohol misuse would be supplemented but not changed by the rule proposed here. Currently, under the FAA's rules, no person may act or attempt to act as a crewmember of a civil aircraft within 8 hours after consuming any alcoholic beverage, while under the influence of alcohol, or while having .04 percent by weight or more of alcohol in the blood. (14 CFR 91.17(a).) In limited circumstances, the FAA's regulations require crewmembers to submit to alcohol tests requested by State or local law enforcement officers and, upon request, to furnish the results of such tests to the Administrator. (14 CFR 91.17(c).) Refusal to take a properly authorized law enforcement alcohol test or to furnish the results can result in the denial, revocation, or suspension of an airman certificate issued under part 61 or 63. (14 CFR 61.16 and 63.12a.)

Holders of or applicants for medical certificates issued under 14 CFR part 67 are subject to additional regulations regarding alcohol use. First, a diagnosis of alcoholism is a disqualifying factor for a medical certificate. A diagnosed alcoholic must be evaluated by the Federal Air Surgeon and meet certain recovery criteria prior to receiving a medical certificate. However, to facilitate recovery and to prevent the unnecessary loss of skilled employees, a program established by the FAA, the airline industry, and the pilots' unions has enabled hundreds of alcoholic pilots to safely return to duty. The program combines confrontation, therapy, and stringently monitored aftercare.

Part 67 also provides that any individual who applies for a medical certificate must permit access by the Administrator to information in the National Driver Register concerning drug- and alcohol-related driving offenses. (14 CFR 67.3.) If an individual has had two or more such offenses within 3 years after the effective date of the rule, the FAA may suspend or revoke a part 61 airman certificate held by the individual or deny the individual's application for such certificate. (14 CFR 61.15.)

Discussion of Amendments

OST Common Preamble

OST, seeking to determine the extent of any alcohol problem in the transportation industries, issued an advance notice of proposed rulemaking (ANPRM) on November 2, 1989. The ANPRM asked for comment on a variety of issues related to preventing alcohol misuse by transportation workers, and several hundred comments were received. A thorough discussion of these comments and of the general issues related to alcohol use in the transportation industries is found in the common preamble published elsewhere in today's **Federal Register** .The OST preamble also addresses the multi-modal aspects of the Omnibus Transportation Employee Testing Act of 1991 (the Act) (Pub. L. 102–143, title V), which provides the statutory mandate for the rule proposed in this notice and for the related notices of other operating administrations. This common preamble is incorporated into this notice by reference. Any aspects of the proposed rule that are not discussed below are addressed in the common preamble.

Proposed Alcohol Misuse Prevention Program (AMPP)

The rule proposed in this NPRM would use three primary tools for reducing the threat of alcohol misuse in aviation. First, by amending parts 65, 121, and 135, the rule would prohibit certain alcohol-related conduct by employees performing safety-sensitive duties. Second, under the provisions of new appendix J to part 121, such

employees would be subject to pre-employment/pre-duty, random, post-accident, reasonable suspicion, return to duty, and follow-up alcohol testing. This testing would be federally-mandated but would be administered by the affected employers. Third, in accordance with requirements in appendix J, employees subject to the rule would be provided with materials designed to educate them about the provisions of the rule and the consequences of engaging in alcohol misuse.

Other Requirements Imposed by Employers; Requirement for Notice

The scope of the FAA's proposed rule is limited to prohibiting alcohol misuse and to providing for testing when there is a direct implication for aviation safety. Should an aviation employer determine that, as a matter of company policy, a different program should be implemented, the employer would be able to establish such a program. Any such program, however, would have to be clearly separate from the program that would be required under this rule, with appropriate notice given prior to tests under this rule. These provisions should preclude the commingling of employer-directed and FAA-mandated programs—a problem that has been of significant concern to the FAA in the context of anti-drug programs.

Employers Who Would Be Required To Establish Programs

During the development and implementation of the FAA's industry anti-drug program, the FAA carefully considered the appropriate scope of the rule. After the implementation of the rule, the FAA amended the scope to eliminate most of the operations that do not require a part 121 or part 135 certificate. The amendment was based on the FAA's determination that the minimal benefit to public safety that might accrue from inclusion of these operators did not warrant the cost and intrusiveness of drug testing (56 FR 43974; September 5, 1991).

This NPRM proposes to include essentially the same classes of employers as are covered by the anti-drug rule: 14 CFR part 121 certificate holders, 14 CFR part 135 certificate holders, sightseeing operators who meet the criteria of 14 CFR 135.1(c), and air traffic control (ATC) facilities not operated by the FAA or the U.S. military would have to establish alcohol misuse prevention programs. Companies with employees who perform safety-sensitive functions by contract for these employers would be permitted to establish and manage programs under this appendix. However, while a contractor company that manages its own program would perform all of the functions required of an "employer" in proposed appendix J, the certificate holders, operators, and ATC facilities would remain responsible for ensuring that all covered employees who perform services for them are subject to an approved program.

One change from the coverage in the anti-drug rule should be noted: ATC facilities operated under contract with the FAA were not included in the FAA's anti-drug rule. It was originally presumed that employees of such facilities were sufficiently subject to the supervision and control of the FAA that inclusion in the FAA's program (for its own employees) would be feasible. Subsequently, however, it was determined that the scope of the FAA's authority did not extend to such inclusion. Therefore, employees of contract ATC facilities should be subject to the FAA's rules for the aviation industry, and would be included under the scope of the proposed alcohol misuse rule.

Employees Who Would Be Subject to the Rule

This proposed rule would cover employees performing certain specified safety-sensitive functions. The FAA proposes to retain essentially the same coverage as the anti-drug rule, that is persons performing any of the following duties: Flight crewmember, flight attendant, flight instruction, aircraft dispatch, aircraft maintenance, ground security coordinator, aviation screening, and air traffic control. The anti-drug rule included flight test duties in its list of covered functions. As a practical matter, these duties are subsumed in the category of flight crewmember duties; therefore, the flight test category would not be included in this rule. Additionally, the category of ground security coordinator duties has been specified separately to reflect the coverage intended by the term "aviation security" in the anti-drug rule.

The FAA has been carefully evaluating the scope of covered functions since implementation of the anti-drug rule in 1989 and finds that the scope remains appropriate and should be adopted for this rule. At this point the FAA is uncertain whether the increased benefit to safety that could accrue by including other functions warrants the imposition of an alcohol testing requirement on individuals performing those functions. However, the FAA is soliciting comment on this issue, with specific focus on the following questions:

1. Are there additional functions with sufficient safety implications to warrant regulating alcohol-related conduct and imposition of a testing requirement?
2. Do air carriers have any data on the size of the additional population that would be affected and the incidence of alcohol misuse by this population?
3. What additional costs would be incurred by inclusion of other functions and what would be the offsetting benefits (*i.e.*, in terms of accident prevention, productivity, etc.)?

The FAA is also considering whether the class of maintenance personnel covered by this rule should be limited to those persons who are in charge of maintenance operations, who perform required inspections, and who have the authority to return an aircraft to service after maintenance has been performed. The FAA seeks comment on the following questions:

1. Should the maintenance population covered by the alcohol misuse rule be limited to supervisors, inspectors, and persons authorized to return aircraft to service?
2. Is the inspection and supervisory system for maintenance sufficiently comprehensive to remove or reduce the safety impact of the actual maintenance work?
3. Would restriction of the covered population have an adverse effect on safety?
4. What cost savings would accrue from limiting the population?

Prohibited Alcohol-Related Conduct

The NPRM would prohibit specific alcohol-related conduct by covered employees. Further, an employer would be prohibited from using a covered employee if the employer had actual knowledge that the employee had engaged in such conduct. Each of the prohibitions has been carefully tailored to minimize the restriction on the otherwise lawful use of alcohol by covered employees by limiting the time of the prohibition to at or near the time of the performance of covered functions. The FAA does not, however, propose to list the specific actions within a safety-sensitive function that would trigger coverage under this rule. This would be determined by the employer based on the requirements of the FAA's regulations and the employer's experience and knowledge of the employees' duties. These determinations would have to be included in the company policy required under the new appendix J and would be subject to FAA review.

The specific prohibitions are:

Alcohol Concentration: The NPRM proposes to establish that a covered

employee would be in violation of the rule with an alcohol concentration of .04 or greater. A concentration of .04 is consistent with the FAA's current regulations regarding alcohol use by crewmembers, and is based on research conducted by the FAA and other DOT agencies into the impairing effects of different amounts of alcohol. Unlike the FAA's present regulatory provisions, however, the proposed rule would also prohibit employers from using an employee to perform a safety-sensitive function if the employee's test result was .02 or greater, but less than .04, until either the employee's next duty period if at least 8 hours has elapsed or the employee is tested again within the 8 hours and has a test result below .02.

Performance of covered functions while under the influence of alcohol: As noted above, the FAA's current regulations prohibit any person from acting or attempting to act as a crewmember while under the influence of alcohol. The FAA's experience in enforcing this provision indicates that it is a useful tool in preventing alcohol misuse. Therefore, the FAA proposes to adopt a similar prohibition in this rule. While the FAA does not propose to specifically define "under the influence," preferring rather to leave open case-by-case analysis, the FAA notes that the proposed rule does provide that "under the influence" would have to be shown by behavior or appearance characteristic of alcohol misuse, or by an adverse effect on the employee's ability to perform his or her assigned functions. Further, if an employer determined that sufficient evidence existed to believe the employee to be under the influence of alcohol, the employer would be required to administer a reasonable suspicion test.

The FAA recognizes that an "under the influence" provision would impose a subjective standard on covered employees and that that standard may in the rare case provide supervisors or employers with a means to harass or unfairly stigmatize employees. It is the intent of the FAA, therefore, that use of this provision to impose sanctions under this rule would be limited to the unusual situation in which an employer could not administer a reasonable suspicion test. The indicators of alcohol misuse are commonly recognized and a reasonable suspicion test supported by such indicators, with a result indicating an alcohol concentration of .04 or greater, would provide the employer with objective, rather than subjective, evidence of alcohol misuse on which to take action.

The FAA has considered whether to permit an employer to take action under this rule against a covered employee for violating the under the influence provision even if an alcohol test result indicated an alcohol concentration below .04. The FAA in no way proposes to limit the employer's authority to remove the employee from the performance of safety-sensitive duties if the employer believed, notwithstanding an alcohol test result, that the employee was impaired (and, in fact, the employer would be required to remove the employee, at least temporarily, if the employee's alcohol concentration was .02 or greater but less than .04). However, to prevent any possibility of harassment and in light of the fact that the FAA has proposed a comprehensive alcohol testing program, the FAA has determined that employers should not be permitted to take other action under this rule for alleged impairment that is not supported by the test result when a test is administered. Any such action would have to be under the employer's independent authority.

On-Duty Use

It is the FAA's intent that this provision would apply to any covered employee who, while not actually performing a safety-sensitive function, could be called at any time to perform. Such an employee (for example, a supervisor) would have to refrain from using alcohol or would be in violation of this provision.

Pre-Duty Use

This notice proposes a two-tiered prohibition with respect to pre-duty use of alcohol. As noted above, the FAA already prohibits any person from acting or attempting to act as a crewmember within 8 hours after the consumption of any alcoholic beverage. This prohibition applies to all persons, including those in general aviation. It was based on a determination by the FAA that a specified period of abstinence would decrease the likelihood that an individual would be impaired by alcohol while acting as a crewmember. (Many air carriers voluntarily impose a longer abstinence period for their crewmembers.) The FAA is aware that individuals who drink to excess may still be impaired even after abstaining for 8 hours; however, the 8-hour rule establishes an adequate behavioral limitation for the majority of persons who are not heavy drinkers. The FAA has determined that the 8-hour limit remains appropriate for crewmembers, and proposes to include a similar prohibition under this rule. This provision would, to some extent, duplicate the restrictions in 14 CFR 91.17(a), but would be limited in application to the covered employees of the specified employers under the rule. Additionally, the rule would prohibit the employers from using covered employees who have impermissibly used alcohol—a restriction that does not currently exist in the FAA's regulations.

The FAA proposes a 4-hour pre-duty use limitation on the remaining classes of covered employees. Imposition of an 8-hour rule on all covered employees could have a safety benefit; however, the FAA is concerned that the nature of the safety-sensitive functions other than crewmember duties are sufficiently different that an 8-hour limitation on pre-duty use of alcohol for those classes could constitute an unwarranted intrusion by the Federal government into the off-duty life of aviation industry employees.

The FAA is asking for comment on whether covered employees performing safety-sensitive functions other than crewmember duties should be subject to a pre-duty alcohol use limitation. If so, how long should the period be; if not, why not?

Use Following An Accident

Under the proposed rule, a covered employee with actual knowledge of an accident involving an aircraft for which he or she performed a safety-sensitive function at or near the time of the accident would be required to refrain from using alcohol for 8 hours unless the employee had been given a post-accident test or the employer had determined that the employee's performance could not have contributed to the accident. The restriction on use, as proposed, would primarily affect those employees whose performance of duties may have contributed to the accident and whose consumption of alcohol prior to the time of the accident would be relevant information that should not be masked by post-accident consumption. While the prohibition would be imposed on covered employees, employers would be encouraged to attempt to control the actions of the affected employees as circumstances permit.

Refusal to Submit to a Required Alcohol Test

A refusal to submit to random, post-accident, reasonable suspicion, or follow-up testing would be, in addition to a rule violation (as discussed in the common preamble), a potential basis for the denial, suspension, or revocation of a certificate issued under 14 CFR part 61, 63, or 65. The inclusion of such provisions is necessary both to deter

noncompliance with the rule and to emphasize the important role that testing plays in increasing aviation safety. The FAA does not propose to attach any consequences other than preclusion from performing a safety-sensitive function to an individual's choice not to submit to pre-employment/pre-duty or return to duty testing.

Required Alcohol Testing

As previously mentioned, under the proposed rule aviation employees who perform safety-sensitive functions for certain employers would be subject to several types of alcohol testing: pre-employment/pre-duty, post-accident, random, reasonable suspicion, and return to duty and follow-up (after engaging in prohibited conduct or refusing to submit to required testing). Additionally, a covered employee who had an alcohol concentration of .02 or greater but less than .04 on any test would have to undergo another test if the employer wanted to permit the employee to perform a safety-sensitive function within 8 hours of the first test. All testing would have to be conducted using the DOT-wide procedures for alcohol testing contained in proposed amendments to 49 CFR part 40 issued by OST this day. The procedures would be incorporated by reference into the FAA's rule.

Pre-Employment/Pre-Duty Testing

The procedures and rationale for pre-employment/pre-duty alcohol testing are addressed in the OST common preamble.

The FAA is requesting specific comment on whether the proposed procedure for using the results of prior pre-employment/pre-duty alcohol tests is useful. It is particularly interested in knowing whether employers would be likely to use this option, whether they would hesitate to use another employer's result, and whether the need to obtain prior test results and the other required evidence would make the option too burdensome to provide a real benefit to employers.

Post-Accident Testing

The FAA's current anti-drug rule requires post-accident testing for drug use, and the proposed alcohol misuse rule includes an analogous provision for alcohol testing. The triggering event for such testing would be the same as in the anti-drug rule. Similarly, the employees subject to testing would be the same—covered employees whose performance of safety-sensitive functions either contributed to an accident or cannot be completely discounted as a contributing factor. Additionally, the purpose of this testing would be the same as under the anti-drug rule: to determine if an employee should be removed from the performance of safety-sensitive functions.

Since alcohol passes through the human system quickly, testing would have to occur within a short time following the accident. An employer who was unable to conduct a timely post-accident test would have to submit an explanatory report to the FAA.

Random Testing

As required by the Act, the proposed rule includes random alcohol testing for covered employees. The FAA has tailored the testing to ensure that testing reasonably serves the FAA's interest in aviation safety. Selection procedures like those in current FAA-approved anti-drug plans would have to be used to ensure randomness of testing.

The anti-drug rule included a "moonlighting" provision for employees working for multiple employers because random drug testing can take place at any time the employee is at work, is intended to detect any drug use, and can detect drug use that may have occurred substantially prior to the test. Because random alcohol testing would be tied to the performance of safety-sensitive functions (and the misuse of alcohol at or near the time of performance), employees who work for more than one employer would have to be in the random testing pool of each employer.

Reasonable Suspicion Testing

The anti-drug rule contains a provision for "reasonable cause" testing of employees who may have used illegal drugs. This proposed rule, like the Act, refers to reasonable suspicion testing; however, the same type of testing is meant by both terms. The FAA recognizes that logistical requirements associated with obtaining an alcohol test may cause some delay in administration of the test and that employers will not maintain or have immediate access to testing equipment at every location where reasonable suspicion testing may have to be conducted. While reasonable suspicion testing should be conducted as close in time as possible to the time of the observations, factors such as being at a remote location or air carrier outstation or having to delay testing while waiting to use equipment shared with another employer would be considered in determining if the timing of a test comported with requirements of the rule. Further, the FAA realizes that a delay in excess of 2 hours from the time of the observations on which the decision to test was made would cause the alcohol concentration determined by the test to decline and possibly drop below .04 or .02.

In some situations, where an unavoidable delay would vitiate the usefulness of a test, it could be appropriate for the employer to take action based on the employee being under the influence of alcohol rather than attempt to obtain an essentially irrelevant test result. The FAA would review each such situation to determine whether the facts supported the employer's determination that it was unable, without substantial difficulty or cost, to conduct a timely reasonable suspicion test.

In the anti-drug rule, the FAA required part 121 and large part 135 certificate holders to have two supervisors, at least one of whom was trained in the detection of drug use, substantiate and concur in the decision to conduct a reasonable cause drug test. All other covered employers could conduct a test if one trained supervisor substantiated the decision to test. Under this proposed rule, a reasonable suspicion alcohol test could be conducted by any employer based on the observations of one supervisor who has been trained in the detection of the symptoms of alcohol misuse.

Return to Duty and Follow-Up Testing

The specific requirements for these types of tests are discussed in the OST common preamble.

Retesting After Result of .02 or Greater But Less Than .04

Retesting under this provision was previously discussed in the context of the proposed alcohol concentration prohibitions. The FAA is seeking comment on whether the proposed "retest or return" procedure gives employers enough flexibility (or too much) in handling covered employees with low-level alcohol concentrations.

Recordkeeping and Reporting; Confidentiality

This rule would require employers to maintain detailed records related to their alcohol misuse prevention programs, including records of alcohol tests performed under this rule. The records would have to be maintained in a secure location and could be released only as required under the rule or with the express written consent of the employee.

The FAA is aware that some employers have hesitated to release information related to drug test results to subsequent employers. Under the anti-drug rule, such releases are based on the general permissive authority

given to employers to release information upon the written consent of the employee. This rule would require the release of employee-specific information to a subsequent employer if the original employer receives a written request from the employee. Providing a regulatory mandate for such release and removal of employer discretion should relieve employers' concerns about possible litigation.

The rule would also provide express authority to the FAA to conduct on-site inspections of employer's alcohol programs, including the alcohol testing process. The FAA's experience with compliance monitoring under the anti-drug rule has indicated that the individuals managing employers' programs are frequently persons with human resources or administration backgrounds. These people often have had no experience with other FAA inspections (*e.g.*, flight standards) and are often unaware of the FAA's authority to conduct such inspections. While the Administrator or his designee has such authority even absent a regulatory provision, the FAA determined that inclusion of such a provision in this rule would be appropriate to ensure industry awareness of the FAA's authority to monitor compliance.

Finally, the reporting of statistical information by employers (and other planholders) is an essential tool for monitoring compliance with the rule. Although the anti-drug rule requires both semi-annual and annual reporting, the FAA's experience with these reports indicates that annual reporting is sufficient to ensure that the FAA can adequately monitor the rule. This NPRM therefore proposes only annual reporting.

Consequences of Engaging in Misuse of Alcohol or Refusing To Submit to Testing

The Omnibus Transportation Employee Testing Act of 1991 (the Act) amended the Federal Aviation Act of 1958 (the FAAct) and the statutes that apply to the Federal Railroad Administration, the Federal Highway Administration, and the Federal Transit Administration. While these amendments have much common language, especially in the area of testing, they are not identical. Of greatest significance, the amendments to the FAAct contain a section entitled "Prohibition on Service," which does not appear in the amendments to the other modes' statutes.

The "Prohibition on Service" section is found at new FAAct section 614(b). Under subsection 614(b)(1), an individual may not remain on duty in a safety-sensitive function if he or she has violated the prohibitions on the use of alcohol. This legislative provision on continued duty is reflected in each of the subsections of the FAA's proposed rule addressing prohibited conduct (see, *e.g.*, proposed 14 CFR 65.46a). Each proposed section states either directly or by implication that the employee may not report for duty or remain on duty requiring the performance of safety-sensitive functions while engaging in conduct prohibited by the rule. These sections further provide that no employer who has actual knowledge that an employee is in violation of the rule may permit the employee to perform or continue to perform safety-sensitive functions. Additionally, proposed appendix J, section V, paragraph A would expressly prohibit an employee who has engaged in conduct prohibited by the rule from performing safety-sensitive functions. This section, consistent with the proposed rules of the other DOT OAs, would also require removal from duty for refusal to submit to a required alcohol test.

Section 614(b)(2) of the FAAct, "Effect of Rehabilitation," states that no covered employee may perform a safety-sensitive function after engaging in prohibited conduct unless he or she has completed a rehabilitation program under the provisions of section 614(c) of the FAAct. Section 614(c)(1) requires the Administrator to prescribe regulations that provide, at a minimum, for the identification of employees in need of assistance in resolving problems with misuse of alcohol. Further, the section gives the Administrator the authority to determine the circumstances under which such employees would be required to participate in any required rehabilitation. The provisions recognize that rehabilitation may not be appropriate or warranted in all cases of prohibited conduct.

The legislative requirement of section 614(b)(2) is implemented in proposed appendix J, section V, paragraph E, "Required evaluation." This proposed section would require that the employee be evaluated in accordance with proposed section VI of the appendix prior to performing covered functions. The evaluation process is discussed further below.

The proposed rule contains a provision, analogous to the one in the anti-drug rule, under which employers would be required to notify the Federal Air Surgeon of any instance in which a holder of a part 67 medical certificate violated the provisions of the rule or refused to submit to a required alcohol test (with the exception of pre-employment/pre-duty tests). The employer would also have to forward to the FAA copies of the evaluations conducted by the SAP. The Federal Air Surgeon would use this information to determine whether further action should be taken with respect to the medical certificate. No such employee could return to the performance of safety-sensitive functions without the Federal Air Surgeon's recommendation.

Section 614(b)(3) of the FAAct, "Performance of prior duties prohibited," provides sanctions for employees who engage in prohibited use of alcohol after the date of the Omnibus Transportation Employee Testing Act. This subsection is found only in the amendments to the FAAct and has no parallel in the amendments to the other modes' statutes. It provides that, under certain circumstances discussed below, an individual shall not be permitted to perform the duties related to air transportation that he or she performed prior to the date he or she engaged in the impermissible use of alcohol. The legislation does not require that the individual's employment be terminated, nor that he or she be reassigned to perform non-safety-sensitive functions. However, it is an absolute bar to the performance of the same duties the employee performed before the violation.

This bar applies under four circumstances. The first occurs if the individual misuses alcohol "while on duty." The remaining prohibitions all relate to rehabilitation: the absolute bar to returning to duty applies if an employee misuses alcohol after the date of enactment, and

1. Had previously misused alcohol and undergone a program of rehabilitation under the regulations promulgated pursuant to the Act;
2. Refused to undertake any required rehabilitation; or
3. Failed to complete any required rehabilitation.

The proposed rule would implement the prohibitions in two ways. First, proposed appendix J, section V, paragraph B, "Permanent disqualification for service" would prohibit an employee who has engaged in prohibited conduct from performing safety sensitive functions if the employee violated the on-duty use prohibition or if the employee twice violated the provisions of the rule after its effective date. As drafted, this bar would apply to the performance of any safety-sensitive function. Although this bar would be more extensive than that required by the Act, the FAA believes

that the alternative of a narrow bar would lead to anomalous results; for example, a person might be barred from performing screening duties but could serve as a pilot. Additionally, the bar on two-time violators would apply both to persons who had gone through rehabilitation and to those who, after evaluation by a SAP, were determined not to need treatment. Otherwise, an employee who was found to need treatment and had an instance of recidivism would be sanctioned, but an employee who did not need assistance but simply chose to engage in misuse of alcohol would not be sanctioned.

Second, the bar following a refusal or failure of rehabilitation would be implicitly implemented by the requirement that prior to returning to duty performing safety-sensitive functions each employee must be evaluated by an SAP to determine whether the employee properly met the requirements for rehabilitation established during the initial evaluation. An employee who did not meet the requirements, whether by failure or refusal, would be precluded from returning to the performance of safety-sensitive functions. The FAA has chosen, however, not to propose a definite time period during which the employee must comply. The rule would thus allow for the denial phase that most people go through when first confronted with evidence of an alcohol problem.

Alcohol Misuse Information and Training

Unlike the FAA's current anti-drug program, this NPRM does not propose to require training for covered employees, other than for supervisors who would make reasonable suspicion testing determinations. Whereas the dangers posed by various drugs and the indicators of use of the different drugs are not widely recognized, the hazards and indicators of alcohol misuse are a matter of common knowledge. Therefore, basic alcohol awareness training appears to be unnecessary. With respect to supervisors who would direct reasonable suspicion tests, however, the FAA believes that the rule should include a training requirement. This training would be sufficiently detailed to ensure that reasonable suspicion testing is directed only on specific bases meeting the requirements of this rule.

The FAA is specifically seeking comment on whether the rule should include alcohol awareness training for all employees.

Employee Referral, Evaluation, and Treatment

In drafting the proposed rule, representatives from other OAs and the FAA gave considerable thought to the issue of rehabilitation of employees who engage in alcohol misuse. During the rulemaking on the anti-drug rule, the FAA received comments from industry, labor organizations, and others stressing the sometimes conflicting needs of employer flexibility and employee health. In the end, the FAA was largely silent on the issue of rehabilitation. Although, as discussed above, the Act does address the need for rehabilitation, it has left to the discretion of the Administrator the method for approaching that need.

The FAA has chosen not to prescribe regulations with respect to specific types of rehabilitation. Rather, it is proposing a process under which each covered employee who engages in alcohol misuse or who refuses to submit to testing would be advised of all resources available to the employee. Further, each such employee would be evaluated by a SAP who would determine whether and what assistance the employee needed in resolving problems associated with alcohol misuse. Whether the employer would provide any required treatment or would hold a position open for the employee upon completion of the treatment would be a matter for employer/employee negotiation.

Employer Alcohol Misuse Prevention Program Plans

The FAA proposes to include a requirement that employers submit alcohol misuse prevention program (AMPP) plans to the FAA for approval prior to implementation of a program under the rule. The plan approval process was used during the implementation of the anti-drug rule and proved invaluable in assisting the industry in establishing programs and educating the industry about the requirements of the rule. Additionally, the plan submission requirement provided the FAA with the ability to readily determine which companies were failing or refusing to comply with the rule. The FAA also uses the plans in its ongoing compliance and enforcement efforts.

Under the proposed alcohol misuse rule, the FAA would require that the plans be submitted by certified mail, return receipt requested. With the exception of consortia core plans, the plans would be deemed approved by the FAA 60 days after the date on the receipt unless the FAA notified the plan submitter otherwise.

The elements that would be required in the plans include the AMPP manager; the type of evidential breath testing (EBT) device to be used for testing; the person or company that will be collecting breath specimens; and the person or company that will be providing EBT maintenance and breath alcohol technician training. The plan would also identify the SAP and include certification that the plan submitter agreed to comply with the provisions of the alcohol misuse prevention regulations.

As mentioned above, the FAA proposes to permit companies whose employees perform covered services by contract to an employer to establish independent alcohol misuse prevention programs. Contractor companies would be able to submit plans directly to the FAA for approval and to implement approved plans for their own employees. Each plan submitter, whether a contractor company or an employer, would be responsible for maintaining a program in accordance with the approved plan and the final rule. A contractor company, for example, would be required to maintain the confidentiality of records pertaining to its employees and could disclose such records only in accordance with the rule. The FAA's experience with the anti-drug program indicates that permitting contractor companies to manage their own programs is generally the most efficient method through which to ensure coverage of contractor employees. As with the anti-drug program, the FAA would exercise control over the contractor companies that establish programs by retaining the ability to revoke the plan approval of any contractor company that fails to properly implement its approved AMPP plan. Because employers would be able to use only contractor employees who were subject to an FAA-approved program, potential revocation of such approval would provide a strong incentive to contractor companies to properly implement their programs.

The FAA also proposes to permit employers and contractor companies to join consortia for purposes of complying with the rule. The proposed consortia system, which is based on the system developed under the anti-drug rule, would require an entity (or a group of employers/contractors) to develop a core program and submit a plan to the FAA for approval. The core program would have to contain all of the operational elements of the plan. Once the FAA approved the core program, the consortium would be able to seek

clients ("riders"). Both the client and the consortium would submit a rider plan to the FAA, which would essentially just identify the employer/contractor company program manager and include a certification by both the consortium and the client that each understands its responsibilities under the proposed rule.

Although the preparation of plans by the industry and review of the plans by the FAA could be somewhat burdensome, the FAA has found in its anti-drug program that the utility of these plans more than offsets any burden.

Phased Implementation

The NPRM includes a proposed schedule for phased implementation of the AMPP for the aviation industry. For each class of employers, the rule would require plan submission by a certain date and implementation of the approved plan 6 months later. Employers would have 8 months after their specified plan submission date to ensure that contractor employees are subject to an approved program. Part 121 and large part 135 certificate holders (more than 50 covered employees) and air traffic control facilities would be required to comply with the rule first, with implementation proposed to occur 12 months after the effective date of the rule. Part 135 certificate holders with 11 to 50 covered employees would be in the second phase of implementation (18 months after the effective date), with small part 135 certificate holders and § 135.1(c) operators in the last phase (24 months after the effective date of the final rule).

The FAA used phased implementation in establishing the anti-drug program, and found it to be the most efficient method through which to ensure that the industry had adequate time to comply with the rule and that the FAA had sufficient resources to review the required plans. Although implementation of this rule would be phased over two years, the actual process of implementation should be facilitated by the experience the FAA and the industry with implementation of the anti-drug rule. Virtually all of the employers who would be subject to this rule are also subject to the anti-drug rule and have experience in establishing and maintaining testing and training programs. While the operational aspects of this rule would be somewhat different from those of the anti-drug rule, the time to comply as currently contemplated in the NPRM should be more than sufficient.

The FAA invites comment on the proposed implementation schedule, especially with respect to any specific difficulties the industry foresees could impede implementation of the rule.

Employees Located Outside the U.S.

As proposed, this rule would apply to direct employees of U.S. air carriers who perform safety-sensitive functions outside the U.S. after January 2, 1995. The rule would not permit testing of such employees, however, if the FAA receives written documentation from an employer demonstrating that such testing would be inconsistent with the laws and regulations of the country in which the testing would occur. Employers would have to submit copies, in English, of applicable laws and regulations. It is within the purview of this agency to regulate the conduct of direct employees of holders of FAA-issued operating certificates, regardless of the location of the employees. However, the FAA is mindful of the fact that employee testing is impermissible in many countries, and does not wish to pose an impossible burden on its regulated employers. The delayed effective date of the rule should permit adequate time for employers to determine whether alcohol testing comports with the laws and regulations of the countries in which its employees are located.

Paperwork Reduction Act Approval

Proposed appendix J to part 121 would require each employer to submit to the FAA: An alcohol misuse prevention program plan for approval by the FAA; notification to the FAA of alcohol misuse by holders of airman medical certificates issued under 14 CFR part 67; notification to the FAA of refusals to submit to alcohol testing by holders of airman certificates issued under 14 CFR parts 61, 63, and 65; and annual statistical reports summarizing data on the employer's alcohol misuse prevention program. To provide the notifications and reports to the FAA, employers will be required to maintain records related to each covered employee, including test results.

In accordance with the Paperwork Reduction Act of 1980 (Pub. L. 96–511), the recordkeeping and reporting requirements proposed in this notice will be submitted to the Office of Management and Budget (OMB) for approval. Comments on these requirements should be submitted to the Office of Information and Regulatory Affairs (OMB), New Executive Office Building, room 3001, Washington, DC 20503; attention: FAA Desk Officer. A copy should be submitted to the FAA docket. Commenters should especially provide their views on the accuracy of the FAA's estimate of the burdens associated with these requirements, the practical utility of the information to be obtained, and less burdensome reporting alternatives to those proposed in this notice. The following is a synopsis of the assessment of the paperwork burden associated with this notice:

Title: Alcohol Misuse Prevention Program for Personnel Engaged in Specified Aviation Activities.

Need For Information: The information is needed to respond to regulations promulgated in accordance with the Omnibus Transportation Employee Testing Act of 1991, enacted on October 28, 1991.

Proposed Use of Information: The information submitted is intended to be the basis for monitoring industry implementation of and compliance with the FAA Alcohol Misuse Prevention Program. The information will also be used to evaluate the effectiveness of the program.

Frequency:

Alcohol Misuse Prevention Program Plan: One time submission for FAA approval (followed by any necessary amendments to the approved plan if any changes or revisions occur).

Notification of Refusals/Alcohol Misuse: As required.

Statistical Report: Annual.

Burden Estimate: 23,862.

Respondents: Specified aviation employers.

Average Burden, Hours/Respondent/Year: 4.

Economic Summary

This section summarizes a full regulatory evaluation prepared by the FAA and contained in the docket that provides detailed estimates of the economic consequences of this regulatory action. In addition to a summary of the regulatory evaluation, this section also contains a regulatory flexibility determination required by the Regulatory Flexibility Act of 1980 (Pub.L. 96–354) and an international trade impact assessment.

Costs

The FAA calculated costs for three random testing scenarios: 10 percent, 25 percent, and 50 percent. The total costs of testing for all occupational categories for these scenarios have a net present value, over ten years, of $29.9 million, $41.6 million, and $60.8 million, respectively. In addition to testing costs, there are also costs associated with short-notice replacement of employees

who misuse alcohol and evaluating these employees. Adding the testing and follow-up costs, the total ten year discounted costs for the 10 percent random testing scenario, the 25 percent random testing scenario, and the 50 percent random testing scenario total $34.1 million, $46.6 million, and $66.6 million, respectively.

Benefits

The FAA believes that major benefits would accrue from these proposals. The first is the prevention of potential injuries and fatalities and property losses resulting from accidents attributed to alcohol misuse. The second is the potential reduction in absenteeism, lost worker productivity, and medical costs, and improved general safety in the work place resulting from the deterrence of alcohol misuse.

The FAA has estimated that the cost of human fatalities in the event of an accident could be as high as $160.5 million. The estimated cost of a National Transportation Safety Board (NTSB) accident investigation is $1.2 million. Therefore, if this proposed rule prevents one accident attributed to alcohol-impaired performance by a person who performs sensitive safety-related functions in commercial aviation during the 10-year period from 1993 to 2002, discounted benefits of $107.4 million could be realized.

The FAA estimates that productivity gains of $44.7 million, $50.7 million, and $59.6 million, discounted over ten years, would accrue to the aviation industry from the reduction of alcohol misuse, for the 10 percent, 25 percent, and 50 percent random testing scenarios, respectively.

Consequently, the total quantifiable discounted benefits that are expected to result from promulgation of the proposed rule amount to $152.1 million, $158.1 million, and $167.0 million, discounted, over ten years, for the 10 percent, 25 percent, and 50 percent random testing scenarios, respectively.

Cost/Benefit Analysis

Given the costs and benefits discussed above, as summarized in the following table, the FAA finds that all three random testing scenarios are cost beneficial (all costs discounted over ten years):

	10% random	25% random	50% random
Costs	$34.1 mil	$46.6 mil	$66.6 mil.
Benefits	152.2 mil	158.1 mil	167.0 mil.
Benefit/Cost Ratio	4.47	3.40	2.51
Net Benefits	118.1 mil	111.5 mil	100.4 mil.

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) was enacted by Congress to ensure that small entities are not unnecessarily burdened by government regulations. The RFA requires agencies to review rules that may have a "significant economic impact on a substantial number of small entities."

Under FAA Order 2100.14A, the criterion for a "substantial number" is a number that is not less than 11 and that is more than one third of the small entities subject to the rule. For operators of aircraft for hire, a small operator is one that owns, but not necessarily operates, nine or fewer aircraft. The FAA's criteria for "significant impact" are $4,330 or more per year for an unscheduled operator, $111,250 or more per year for a scheduled operator whose entire fleet is made up of airplanes with over 60 seats, and $62,170 or more per year for other scheduled carriers.

This proposed rule would primarily affect holders of certificates issued under parts 121 and 135. The FAA calculated estimated compliance costs for small part 121 and 135 operators owning 9 aircraft. Although the average small operator owns 4 aircraft, this analysis assumes 9 aircraft as a worst case scenario. For a part 121 small operator, the annual costs are expected to be $8,649, for part 135 Scheduled, $3,164, and for part 135 Unscheduled, $1,649. Accordingly, the annual costs expected to be imposed on such small operators would not exceed the thresholds for significant impact outlined above. Therefore, the FAA finds that this proposed rule would not have a significant economic impact on a substantial number of small entities.

International Trade Impact Analysis

The FAA finds that this proposed rule would affect all part 121 and part 135 air carriers. All safety-sensitive part 121 and part 135 employees would be covered. The FAA finds that this proposed rule would not have an adverse impact on trade opportunities for either U.S. firms doing business overseas or foreign firms doing business in the United States. While there would be increased costs to carriers as a consequence of this proposed rule, these costs would be offset by the benefits summarized above and an increase in public confidence.

Federalism Implications

The rule proposed herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, the FAA has determined that this proposal does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

Significance

This proposed rule, if adopted, is not likely to result in an annual effect on the economy of $100 million or more, although it may result in an increase in costs for consumers, industry, or Federal, State, or local agencies. Although the proposed rule is not "major" as defined in Executive Order 12291, the FAA has determined that this proposal involves issues of substantial interest to the public. Therefore, the FAA has determined that the NPRM is significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034; February 2, 1979).

A draft Regulatory Impact Analysis of the proposed rule has been placed in the regulatory docket. A copy may be obtained by contacting the person identified under "FOR FURTHER INFORMATION CONTACT."

Cross-Reference Table

As noted above, a number of DOT agencies in addition to the FAA are publishing notices of proposed rulemaking in today's Federal Register, all of which are introduced by a common preamble prepared by OST. The following cross-reference table identifies the relevant provision of the FAA's NPRM by the subject heading used in the DOT preamble and the location of each provision in the FAA's proposed rule.

Subject heading	FAA NPRM
	(References are to (new) appendix J to 14 CFR part 121, unless noted).
General:	
Purpose	Section I, paragraph A.
Applicability	Sec I, para C (definition of employer); also: 14 CFR 65.46a(a). 14 CFR 121.458(a). 14 CFR 135.253(a).
Alcohol Testing Procedures	Sec I, para B.
Definitions	Sec I, para C.
Preemption	Sec I, para D.
Other Requirements Imposed by Employers.	Sec I, para E.
Requirement for Notice	Sec I, para F.
Starting Dates for Alcohol Testing Programs.	Sec VII, para A(Schedule for submission of plans and implementation).
Prohibited Conduct:	
Alcohol Concentration	14 CFR 65.46a(b). 14 CFR 121.458(b). 14 CFR 135.253(b).
Behavior or Appearance	14 CFR 65.46a(c). 14 CFR 121.458(c). 14 CFR 135.253(c). (Under the influence of Alcohol).
On-duty Use	14 CFR 65.46a(d). 14 CFR 121.458(d). 14 CFR 135.253(d).
Pre-duty Use	14 CFR 65.46a(e). 14 CFR 121.458(e). 14 CFR 135.253(e).
Use Following an Accident	14 CFR 65.46a(f). 14 CFR 121.458(f). 14 CFR 135.253(f).
Refusal to Submit to a Required Alcohol Test.	14 CFR 65.46a(g). 14 CFR 121.458(g). 14 CFR 135.253(g).
Tests Required:	
Pre-employment/pre-duty	Sec III, Para A.
Post-accident	Sec III, Para B.
Random	Sec III, para C.
Reasonable Suspicion	Sec III, para D.
Return to Duty	Sec III, para E.
Follow-up	Sec III, para F.
Retesting * * * .02 or Greater * * *.	Section III, para G.
Handling of Test Results, Record Retention, and Confidentiality:	
Retention of Records	Sec IV, para A.
Reporting of Results	Sec IV, para B.
Access to Facilities and Records.	Sec IV, para C.
Consequences for Employees Engaging in Alcohol-Related Conduct:	
Removal from Safety-Sensitive Function.	Sec V, para A.
Required Evaluation and Testing.	Sec V, para E.
Other Alcohol-Related Conduct	Sec V, para F.
Alcohol Misuse Information, Training, and Referral:	
Employer Obligation to Promulgate a Policy.	Sec VI, para A.
Training for Supervisors	Sec VI, para B.
Referral, Evaluation, and Treatment.	Sec VI, Para C.
Major Additional Provisions in FAA NPRM:	
Refusal to Submit to a Drug or Alcohol Test (certificate action).	14 CFR 61.14. 14 CFR 63.12b. 14 CFR 65.23.
Testing for Alcohol	14 CFR 65.46(b). 14 CFR 121.459. 14 CFR 135.255.
Covered Employees	Sec II.
Permanent Disqualification for Service.	Sec V, para B.
Notice to the Federal Air Surgeon.	Sec V, para C.
Notice of Refusals	Sec V, para D.
Employer's Alcohol Misuse Prevention Program Plan.	Sec VII.
Employees Outside the U.S	Sec VIII.

List of Subjects

14 CFR Part 61

Air safety, Air transportation, Aircraft, Aircraft pilots, Airmen, Alcohol, Alcoholism, Aviation safety, Safety, Transportation.

14 CFR Part 63

Air safety, Air transportation, Aircraft, Airmen, Alcohol, Alcoholism, Aviation safety, Safety, Transportation.

14 CFR Part 65

Air safety, Air traffic, Air transportation, Aircraft, Airmen, Alcohol, Alcoholism, Aviation safety, Safety, Transportation.

14 CFR Part 121

Air carriers, Air transportation, Aircraft, Aircraft pilots, Airmen, Airplanes, Alcohol, Alcoholism, Aviation safety, Pilots, Safety, Transportation.

14 CFR Part 135

Air carriers, Air taxi, Air transportation, Aircraft, Airmen, Airplanes, Alcohol, Alcoholism, Aviation safety, Pilots, Safety, Transportation.

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR parts 61, 63, 65, 121, and 135 as follows:

PART 61—CERTIFICATION: PILOTS AND FLIGHT INSTRUCTORS

1. The authority citation for part 61 is revised to read as follows:

Authority: 49 U.S.C. 1354(a), 1355, 1421, 1422, and 1427 (revised, Pub. L. 102–143, October 28, 1991); 49 U.S.C. 106(g) (revised, Pub. L. 97–449, January 12, 1983).

2. Section 61.14 is revised to read as follows:

§ 61.14 Refusal to submit to a drug or alcohol test.

(a) This section applies to an employee who performs a function listed in appendix I or appendix J to part 121 of this chapter directly or by contract for a part 121 certificate holder, a part 135 certificate holder, or an operator as defined in § 135.1(c) of this chapter.

(b) Refusal by the holder of a certificate issued under this part to take a drug test required under the provisions of appendix I to part 121 or an alcohol test required under the provisions of appendix J to part 121 is grounds for—

(1) Denial of an application for any certificate or rating issued under this part for a period of up to 1 year after the date of such refusal; and

(2) Suspension or revocation of any certificate or rating issued under this part.

PART 63—CERTIFICATION: FLIGHT CREWMEMBERS OTHER THAN PILOTS

3. The authority citation for part 63 is revised to read as follows:

Authority: 49 U.S.C. 1354(a), 1355, 1421, 1422, 1427, 1429, and 1430 (revised, Pub. L. 102–143, October 28, 1991); 49 U.S.C. 106(g) (revised, Pub. L. 97–449, January 12, 1983).

4. Section 63.12b is revised to read as follows:

§ 63.12b Refusal to submit to a drug or alcohol test.

(a) This section applies to an employee who performs a function listed in appendix I or appendix J to part 121 of this chapter directly or by contract for a part 121 certificate holder, a part 135 certificate holder, or an operator as defined in § 135.1(c) of this chapter.

(b) Refusal by the holder of a certificate issued under this part to take a drug test required under the provisions of appendix I to part 121 or an alcohol test required under the provisions of appendix J to part 121 is grounds for—

(1) Denial of an application for any certificate or rating issued under this

part for a period of up to 1 year after the date of such refusal; and

(2) Suspension or revocation of any certificate or rating issued under this part.

PART 65—CERTIFICATION: AIRMEN OTHER THAN FLIGHT CREWMEMBERS

5. The authority citation for part 65 is revised to read as follows:

Authority: 49 U.S.C. 1354(a), 1355, 1421, 1422, and 1427 (revised, Pub. L. 102–143, October 28, 1991); 49 U.S.C. 106(g) (revised, Pub. L. 97–449, January 12, 1983).

6. Section 65.23 is revised to read as follows:

§ 65.23 Refusal to submit to a drug or alcohol test.

(a) *General.* This section applies to an employee who performs a function listed in appendix I or appendix J to part 121 of this chapter directly or by contract for a part 121 certificate holder, a part 135 certificate holder, an operator as defined in § 135.1(c) of this chapter, or an air traffic control facility not operated by the FAA or the U.S. military.

(b) Refusal by the holder of a certificate issued under this part to take a drug test required under the provisions of appendix I to part 121 or an alcohol test required under the provisions of appendix J to part 121 is grounds for—

(1) Denial of an application for any certificate or rating issued under this part for a period of up to 1 year after the date of such refusal; and

(2) Suspension or revocation of any certificate or rating issued under this part.

7. Section 65.46a is added to read as follows:

§ 65.46a Misuse of alcohol.

(a) This section applies to employees who perform air traffic control duties directly or by contract for an employer that is an air traffic control facility not operated by the FAA or the U.S. military (*covered employees*).

(b) Alcohol concentration. No covered employee shall report for duty or remain on duty requiring the performance of safety-sensitive functions while having an alcohol concentration of .04 or greater. No employer having actual knowledge that an employee has an alcohol concentration of .04 or greater shall permit the employee to perform or continue to perform safety-sensitive functions.

(c) Under the influence of alcohol. Notwithstanding the absence of a reasonable suspicion alcohol test under appendix J to part 121 of this chapter, no covered employee shall report for duty or remain on duty requiring the performance of safety-sensitive functions while the employee is under the influence of or impaired by alcohol, as shown by behavior or appearance characteristic of alcohol misuse or by an adverse effect on the employee's ability to perform his or her assigned functions. No employer having actual knowledge that the employee is in violation of this provision shall permit a covered employee to perform or continue to perform safety-sensitive functions.

(d) On-duty use. No covered employee shall use alcohol while performing safety-sensitive functions. No employer having actual knowledge that a covered employee is using alcohol while performing safety-sensitive functions shall permit the employee to perform or continue to perform safety-sensitive functions.

(e) Pre-duty use. No covered employee shall perform air traffic control duties within 4 hours after using alcohol. No employer having actual knowledge that such an employee has used alcohol within 4 hours shall permit the employee to perform or continue to perform air traffic control duties.

(f) Use following an accident. No covered employee who has actual knowledge of an accident involving an aircraft for which he or she performed a safety-sensitive function at or near the time of the accident shall use alcohol for 8 hours following the accident, unless he or she has been given a post-accident test under appendix J to part 121 of this chapter, or the employer has determined that the employee's performance could not have contributed to the accident.

(g) Refusal to submit to a required alcohol test. No covered employee shall refuse to submit to a post-accident, random, reasonable suspicion, or follow-up alcohol test required under appendix J to part 121 of this chapter. No employer shall permit an employee who refuses to submit to such a test to perform or continue to perform safety-sensitive functions.

8. Section 65.46b is added to read as follows:

§ 65.46b Testing for alcohol.

(a) Each air traffic control facility not operated by the FAA or the U.S. military (hereinafter *employer*) must establish an alcohol misuse prevention program in accordance with the provisions of appendix J to part 121 of this chapter.

(b) No employer shall use any person who meets the definition of *covered employee* in appendix J to part 121 to perform a safety-sensitive function listed in that appendix unless such person is subject to testing for alcohol misuse in accordance with the provisions of appendix J.

PART 121—CERTIFICATION AND OPERATIONS: DOMESTIC, FLAG, AND SUPPLEMENTAL AIR CARRIERS AND COMMERCIAL OPERATORS OF LARGE AIRCRAFT

9. The authority citation for part 121 is revised to read as follows:

Authority: 49 U.S.C. 1354(a), 1355, 1356, 1357, 1401, 1421–1430, 1485, and 1502 (revised, Pub. L. 102–143, October 28, 1991); 49 U.S.C. 106(g) (revised, Pub. L. 97–449, January 12, 1983).

10. Section 121.458 is added to read as follows:

§ 121.458 Misuse of alcohol.

(a) *General.* This section applies to employees who perform a function listed in appendix J to this part for a certificate holder (*covered employees*). For the purpose of this section, a person who meets the definition of covered employee in appendix J is considered to be performing the function for the certificate holder.

(b) *Alcohol concentration.* No covered employee shall report for duty or remain on duty requiring the performance of safety-sensitive functions while having an alcohol concentration of .04 or greater. No certificate holder having actual knowledge that an employee has an alcohol concentration of .04 or greater shall permit the employee to perform or continue to perform safety-sensitive functions.

(c) *Under the influence of alcohol.* Notwithstanding the absence of a reasonable suspicion alcohol test under appendix J to this part, no covered employee shall report for duty or remain on duty requiring the performance of safety-sensitive functions while the employee is under the influence of or impaired by alcohol, as shown by behavior or appearance characteristic of alcohol misuse or by an adverse effect on the employee's ability to perform his or her assigned functions. No certificate holder having actual knowledge that the employee is in violation of this provision shall permit a covered employee to perform or continue to perform safety-sensitive functions.

(d) *On-duty use.* No covered employee shall use alcohol while performing safety-sensitive functions. No certificate holder having actual knowledge that a covered employee is using alcohol while performing safety-sensitive functions shall permit the employee to perform or continue to perform safety-sensitive functions.

(e) *Pre-duty use.* (1) No employee shall perform flight crewmember or flight attendant duties within 8 hours after using alcohol. No certificate holder having actual knowledge that such an employee has used alcohol within 8 hours shall permit the employee to perform or continue to perform the specified duties.

(2) No employee shall perform safety-sensitive duties other than those specified in paragraph (e)(1) of this section within 4 hours after using alcohol. No certificate holder having actual knowledge that such an employee has used alcohol within 4 hours shall permit the employee to perform or continue to perform safety-sensitive functions.

(f) *Use following an accident.* No covered employee who has actual knowledge of an accident involving an aircraft for which he or she performed a safety-sensitive function at or near the time of the accident shall use alcohol for 8 hours following the accident, unless he or she has been given a post-accident test under appendix J of this part, or the employer has determined that the employee's performance could not have contributed to the accident.

(g) *Refusal to submit to a required alcohol test.* No covered employee shall refuse to submit to a post-accident, random, reasonable suspicion, or follow-up alcohol test required under appendix J to this part. No certificate holder shall permit an employee who refuses to submit to such a test to perform or continue to perform safety-sensitive functions.

11. Section 121.459 is added to read as follows:

§ 121.459 Testing for alcohol.

(a) Each certificate holder must establish an alcohol misuse prevention program in accordance with the provisions of appendix J to this part.

(b) No certificate holder shall use any person who meets the definition of *covered employee* in appendix J to this part to perform a safety-sensitive function listed in that appendix unless such person is subject to testing for alcohol misuse in accordance with the provisions of appendix J.

12. Appendix J to part 121 is added to read as follows:

Appendix J to Part 121—Alcohol Misuse Prevention Program

This appendix contains the standards and components that must be included in an alcohol misuse prevention program required by this chapter.

I. General.

A. *Purpose.* The purpose of this appendix is to establish programs designed to help prevent accidents and injuries resulting from the misuse of alcohol by employees who perform safety-sensitive functions in aviation.

B. *Alcohol testing procedures.* Each employer shall ensure that all alcohol testing conducted pursuant to this appendix complies with the procedures set forth in 49 CFR part 40. The provisions of 49 CFR part 40 that address alcohol testing are incorporated by reference into and are made applicable to employers by this appendix.

C. *Definitions.* As used in this appendix—

Accident means an occurrence associated with the operation of an aircraft which takes place between the time any person boards the aircraft with the intention of flight and the time all such persons have disembarked, and in which any person suffers death or serious injury or in which the aircraft receives substantial damage.

Administrator means the Administrator of the Federal Aviation Administration or his or her designated representative.

Alcohol means ethyl alcohol (ethanol).

Alcohol concentration (or content) means the alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by an evidential breath test performed under this appendix. When the indicated alcohol concentration of a covered employee on an initial alcohol test is different from an indicated alcohol concentration on a confirmatory test, and the consequences of the two results would differ under the provisions of this appendix, the lower result shall be considered the final result on which action under this appendix shall be based.

Alcohol use means the use of alcohol include consumption of any beverage, mixture, or preparation, including any medication, containing alcohol.

Confirmatory test means a second analytical procedure, separate from the screening test, to determine the concentration of alcohol in a covered employee's system. The confirmatory test may or may not use a different chemical principle from that of the screening test, but shall employ a scientifically recognized method of testing capable of providing quantitative data regarding alcohol concentration. For specific requirements concerning evidential breath testing devices see 49 CFR part 40.

Consortium means an entity, including a group or association of employers or contractors, that provides alcohol testing as required by this appendix and that acts on behalf of such employers or contractors, provided that it has an alcohol misuse prevention plan approved by the FAA in accordance with this appendix.

Contractor company means a company that has employees who perform safety-sensitive functions by contract for an employer.

Covered employee means a person who performs, either directly or by contract, a safety-sensitive function listed in section II of this appendix for an employer (as defined below). For purposes of pre-employment/pre-duty testing only, the term "covered employee" includes a person applying to perform a safety-sensitive function.

DOT agency means an agency (or "operating administration") of the United States Department of Transportation administering regulations requiring alcohol testing (14 CFR parts 65, 121, and 135; 49 CFR parts 199, 219, and 382) in accordance with 49 CFR part 40.

Employer means a part 121 certificate holder; a part 135 certificate holder; an air traffic control facility not operated by the FAA or the U.S. military; and an operator as defined in 14 CFR 135.1(c).

Initial alcohol test (or screening test) means an analytical procedure to determine whether a covered employee may have a prohibited concentration of alcohol in his or her system.

Performing (a safety-sensitive function): an employee is considered to be performing a safety-sensitive function during any period in which he or she is actually performing, ready to perform, or immediately available to perform such functions.

Refuse to submit (to an alcohol test) means that a covered employee fails to provide adequate breath for testing without a valid medical explanation after he or she has received notice of the requirement to be tested in accordance with this appendix, or engages in conduct that clearly obstructs the collection process.

Safety-sensitive function means a function listed in section II of this appendix.

Substance abuse professional means a licensed physician (Medical Doctor or Doctor of Osteopathy), or a licensed or certified psychologist, social worker, or employee assistance professional with knowledge of and clinical experience in the diagnosis and treatment of alcohol-related disorders.

D. *Preemption of State and local laws.* 1. Except as provided in subparagraph 2 of this paragraph, these regulations preempt any State or local law, rule, regulation, or order to the extent that:

(a) Compliance with both the State or local requirement and this appendix is not possible; or

(b) Compliance with the State or local requirement is an obstacle to the accomplishment and execution of any requirement in this appendix.

2. The alcohol misuse requirements of this title shall not be construed to preempt provisions of State criminal law that impose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property, whether the provisions apply specifically to transportation employees or employers or to the general public.

E. *Other requirements imposed by employers.* Except as expressly provided in these alcohol misuse requirements, nothing in these requirements shall be construed to affect the authority of employers, or the rights of employees, with respect to the use or possession of alcohol, including any authority and rights with respect to alcohol testing and rehabilitation.

F. *Requirement for notice.* Before performing an alcohol test under this appendix, each employer shall notify a covered employee that the alcohol test is required by this appendix. No employer shall falsely represent that a test is administered under this appendix.

II. Covered Employees

Each employee who performs a function listed in this section directly or by contract

for an employer as defined in this appendix must be subject to alcohol testing under an FAA-approved alcohol misuse prevention program implemented in accordance with this appendix. The covered safety-sensitive functions are:

1. Flight crewmember duties.
2. Flight attendant duties.
3. Flight instruction duties.
4. Aircraft dispatcher duties.
5. Aircraft maintenance duties.
6. Ground security coordinator duties.
7. Aviation screening duties.
8. Air traffic control duties.

III. Tests Required

A. *Pre-employment/pre-duty.* 1. Prior to the first time a covered employee performs safety-sensitive functions for an employer, the employee shall undergo testing for alcohol. No employer shall allow a covered employee to perform safety-sensitive functions unless the employee has been administered an alcohol test with a result indicating an alcohol concentration less than .04. If a pre-employment/pre-duty test result under this paragraph indicates an alcohol concentration of .02 or greater but less than .04, the provisions of paragraph F of section V of this appendix apply.

2. An employer is not required to administer an alcohol test as required by this paragraph if:

(a) the employee has undergone an alcohol test required by this appendix or the alcohol misuse rule of another DOT agency within the previous 6 months, with a result indicating an alcohol concentration lower than .04; and

(b) the employer ensures that no prior employer of the covered employee of whom the employer has knowledge has records of a violation of §§ 65.46a, 121.458, or 135.253 of this chapter or the alcohol misuse rule of another DOT agency within the previous 6 months.

B. *Post-accident.* 1. As soon as practicable following an accident, an employer shall test each surviving covered employee for alcohol if that employee's performance of a safety-sensitive function either contributed to the accident or cannot be completely discounted as a contributing factor to the accident. The decision not to administer a test under this section shall be based on the employer's determination, using the best available information at the time of the determination, that the employee's performance could not have contributed to the accident.

2. If a test required by this section is not administered within 2 hours following the accident, the employer shall submit a report to the FAA, Office of Aviation Medicine, Drug Abatement Division (AAM–800), 400 7th Street SW., Washington, DC 20590, stating the reasons the test was not promptly administered. If a test required by this section is not administered within 8 hours following the accident, the employer shall cease attempts to administer an alcohol test and shall submit the same report.

3. A covered employee who is subject to post-accident testing who leaves the scene of an accident without a valid reason prior to submission to such test may be deemed by the employer to have refused to submit to testing. Nothing in this section shall be construed to require the delay of necessary medical attention for injured people following an accident or to prohibit a covered employee from leaving the scene of an accident for the period necessary to obtain assistance in responding to the accident or to obtain necessary emergency medical care.

C. *Random testing.* 1. Each employer shall, at various times, randomly select covered employees for unannounced alcohol testing. The selection of employees shall be made by use of a scientifically valid method, such as a random-number table or a computer-based random number generator that is matched with employees' Social Security numbers, payroll identification numbers, or other comparable identifying numbers. Each covered employee shall have an equal chance of being tested under the selection process used.

2. During each 12 month period following the start of random alcohol testing by the employer, the employer shall meet the following conditions:

(a) The dates for administering unannounced testing of randomly-selected covered employees shall be spread reasonably throughout the 12-month period; and

(b) The number of employees randomly selected for testing during the 12-month period shall equal an annual rate of not less than [10–50] percent of the total number of employees subject to alcohol testing under this appendix or the alcohol misuse rule of another DOT agency. If the employer conducts random testing through a consortium, the annual rate may be calculated for each individual employer or for the total number of covered employees subject to random testing by the consortium.

3. A covered employee shall only be tested while the employee is performing safety-sensitive functions; just before the employee is to perform safety-sensitive functions; or just after the employee has ceased performing such functions.

4. Each employer shall require that each covered employee who is notified of selection for random testing proceeds to the testing site immediately. However, if the employee is performing a safety-sensitive function at the time of the notification, the employer shall instead ensure that the employee ceases to perform the safety-sensitive function and proceeds to the testing site as soon as possible.

D. *Reasonable suspicion testing.* 1. Each employer shall require any covered employee to submit to an alcohol test when the employer has reasonable suspicion to believe that the employee has violated the alcohol misuse prohibitions in §§ 65.46a, 121.458, or 135.253 of this chapter.

2. The employer's determination that reasonable suspicion exists to require the covered employee to undergo an alcohol test shall be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the employee. The required observations shall be made by a supervisor who is trained in detecting the symptoms of alcohol misuse. The supervisor who makes the determination that reasonable suspicion exists shall not conduct the breath alcohol test on that employee.

3. Alcohol testing is authorized by this section only if the observations required by paragraph 2 are made during or just preceding the period of the work day that the covered employee is required to be in compliance with this rule. A covered employee may be required to undergo reasonable suspicion testing for alcohol while the employee is performing safety-sensitive functions; just before the employee is to perform safety-sensitive functions; or just after the employee has ceased performing such functions.

E. *Return to duty testing.* Each employer shall ensure that before a covered employee returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited in §§ 65.46a, 121.458, or 135.253 of this chapter, the employee shall undergo a return to duty alcohol test with a result indicating an alcohol concentration of less than .02.

F. *Follow-up testing.* Following a determination under section VI, paragraph C.2 of this appendix that a covered employee is in need of assistance in resolving problems associated with alcohol misuse, each employer shall ensure that the employee is subject to unannounced follow-up alcohol testing as directed by a substance abuse professional in accordance with the provisions of section VI, paragraph C.3(b)(2) of this appendix.

G. *Retesting of covered employees with an alcohol concentration of .02 or greater but less than .04.* Each employer shall retest a covered employee to ensure compliance with the provisions of section V, paragraph F of this appendix, if the employer chooses to permit the employee to perform a safety-sensitive function within 8 hours following the administration of an alcohol test indicating an alcohol concentration of .02 or greater but less than .04.

IV. Handling of Test Results, Record Retention, and Confidentiality

A. *Retention of records.* 1. *General Requirement.* Each employer shall maintain records of its alcohol misuse prevention program as provided in this section. The records shall be maintained in a secure location with controlled access.

2. *Period of Retention.* Each employer shall maintain the records in accordance with the following schedule:

(a) *Five years.* Records of employee alcohol test results with results indicating an alcohol concentration of .02 or greater, documentation of refusals to take required alcohol tests, calibration documentation, and employee evaluations and referrals, shall be maintained for a minimum of 5 years.

(b) *Two years.* Records related to the collection process (except calibration of evidential breath testing devices) and training shall be maintained for a minimum of 2 years.

(c) *One year.* Records of negative test results (as defined in 49 CFR part 40) shall be maintained for a minimum of 1 year.

3. *Types of Records.* The following specific records shall be maintained.

(a) Records related to the collection process:

(1) Collection logbooks, if used.
(2) Documents relating to the random selection process.
(3) Calibration documentation for evidential breath testing devices.
(4) Verification of breath alcohol technician training.
(5) Documents generated in connection with decisions to administer reasonable suspicion alcohol tests.
(6) Documents generated in connection with decisions on post-accident tests.
(7) Documents verifying existence of a medical explanation of the inability of a covered employee to provide adequate breath for testing.
(b) Records related to test results:
(1) The employer's copy of the alcohol test form, including the results of the test;
(2) Documents related to the refusal of any covered employee to submit to an alcohol test required by this appendix.
(3) Documents presented by a covered employee to dispute the result of an alcohol test administered under this appendix.
(c) Documents related to other violations of § 65.46a, § 121.248, or § 135.253 of this chapter.
(d) Records related to evaluations:
(1) Records pertaining to a determination by a substance abuse professional concerning a covered employee's need for assistance.
(2) Records concerning a covered employee's compliance with the recommendations of the substance abuse professional.
(3) Records of notifications to the Federal Air Surgeon of violations of the alcohol misuse prohibitions in this chapter by covered employees who hold medical certificates issued under part 67 of this chapter.
(e) Records related to education and training:
(1) Materials on alcohol misuse awareness, including a copy of the employer's policy on alcohol misuse.
(2) Documentation of compliance with the requirements of section VI, paragraph A of this appendix.
(3) Documentation of training provided to supervisors for the purpose of qualifying the supervisors to make a determination concerning the need for alcohol testing based on reasonable suspicion.
(4) Certification that any training conducted under this appendix complies with the requirements for such training.

B. *Reporting of results in a management information system.* 1. Each employer shall submit to the FAA an annual report covering the calendar year, summarizing the results of its alcohol misuse prevention program.

2. Each employer that is subject to more than one DOT agency alcohol rule shall identify each employee covered by the regulations of more than one DOT agency. The identification will be by the total number and category of covered function. Prior to conducting any alcohol test on a covered employee subject to the rules of more than one DOT agency, the employer shall determine which DOT agency rule or rules authorizes or requires the test. The test result information shall be directed to the appropriate DOT agency or agencies.

3. Each employer shall ensure the accuracy and timeliness of each report submitted by the employer or by a consortium.

4. Each employer shall submit the required annual report no later than February 15 of each year. The report shall be submitted on the form specified by the FAA. Each report shall contain:
(a) Number of covered employees by employee category.
(b) Number of covered employees in each category subject to alcohol testing under the alcohol misuse rule of another DOT agency, identified by each agency.
(c)(1) Number of initial tests by type of test and employee category.
(2) Number of confirmatory tests, by type of test and employee category.
(d) Number of confirmatory alcohol tests indicating an alcohol concentration of .04 or greater, by type of test and employee category.
(e) Number of confirmatory alcohol tests indicating an alcohol concentration of .02 or greater but less than .04.
(f) Number of persons denied a position as a covered employee following a pre-employment/pre-duty alcohol test indicating an alcohol concentration of .04 or greater.
(g) Number of covered employees with a confirmatory alcohol test indicating an alcohol concentration of .04 or greater who were returned to duty in covered positions (having complied with the recommendations of a substance abuse professional as described in section V, paragraph E, and section VI, paragraph C of this appendix).
(h) Number of covered employees who were administered alcohol and drug tests at the same time, with both a positive drug test result and an alcohol test result indicating an alcohol concentration of .04 or greater.
(i) Number of covered employees who were found to have violated other alcohol misuse provisions of §§ 65.46a, 121.458, or 135.253 of this chapter, and the action taken in response to the violation.
(j) Number of covered employees who refused to submit to an alcohol test required under this appendix, and the action taken in response to each refusal.
(k) Number of supervisors who have received training during the reporting period in determining the existence of reasonable suspicion of alcohol misuse.
(l) Direct costs of the program during the reporting period:
(1) Breath collection
(2) Breath analysis (equipment/service)
(3) Substance abuse professional evaluation (if appropriate)
(4) Education and training.

C. *Access to facilities and records.* 1. Except as required by law or expressly authorized or required in this appendix, no employer shall release covered employee information that is contained in records required to be maintained under this appendix.

2. A covered employee is entitled, upon written request, to obtain copies of any records pertaining to the employee's use of alcohol, including any records pertaining to his or her alcohol tests. The employer shall promptly provide the records requested by the employee. Access to an employee's records shall not be contingent upon payment for records other than those specifically requested.

3. Each employer shall permit access to all facilities utilized in complying with the requirements of this appendix to the Secretary of Transportation or any DOT agency with regulatory authority over the employer or any of its covered employees.

4. Each employer shall make available copies of all results of alcohol testing conducted under this appendix and any other information pertaining to the employer's alcohol misuse prevention program, when requested by the Secretary of Transportation or any DOT agency with regulatory authority over the employer or covered employee.

5. When requested by the National Transportation Safety Board as part of an accident investigation, each employer shall disclose information related to the employer's administration of a post-accident alcohol test administered following the accident under investigation.

6. Records shall be made available to a subsequent employer upon receipt of written request from the covered employee. Disclosure by the subsequent employer is permitted only as expressly authorized by the terms of the employee's request.

7. An employer may disclose information required to be maintained under this appendix pertaining to a covered employee to the employee or to the decisionmaker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the individual and arising from the results of an alcohol test administered under this appendix or from the employer's determination that the employee engaged in conduct prohibited under § 65.46a, § 121.458, or § 135.253 of this chapter (including, but not limited to, a worker's compensation, unemployment compensation, or other proceeding relating to a benefit sought by the employee).

8. An employer shall release information regarding a covered employee's records as directed by the specific, written consent of the employee authorizing release of the information to an identified person. Release of such information by the person receiving the information is permitted only in accordance with the terms of the employee's consent.

V. Consequences for Employees Engaging in Alcohol-Related Conduct

A. *Removal from safety-sensitive function.* 1. Except as provided in section VI of this appendix, no covered employee shall perform safety-sensitive functions if the employee has engaged in conduct prohibited by § 65.46a, § 121.458, or § 135.253 of this chapter or an alcohol misuse rule of another DOT agency.

2. No employer shall permit any covered employee to perform safety-sensitive functions if the employer has determined that the employee has violated this paragraph.

B. *Permanent disqualification for service.* An employee is permanently precluded from performing safety-sensitive duties for an employer if the employee has used alcohol in violation of § 65.46a(d), § 121.458(d), or

§ 135.253(d) or if the employee engages in other alcohol misuse in violation of § 65.46a, § 121.458, or § 135.253 of this chapter and had previously engaged in conduct that violated the provisions of § 65.46a, § 121.458, or § 135.253 of this chapter after [*the effective date of the final rule*].

C. *Notice to the Federal Air Surgeon.* 1. An employer who determines that a covered employee who holds a medical certificate issued under part 67 of this chapter has violated the provisions of § 65.46a, § 121.458, or § 135.253 of this chapter shall notify the Federal Air Surgeon within 2 working days.

2. Each such employer shall forward to the Federal Air Surgeon a copy of the report of any evaluation performed under the provisions of section VI of this appendix within 2 working days of the employer's receipt of the report.

3. All documents shall be sent to the Federal Air Surgeon, Office of Aviation Medicine, Drug Abatement Division (AAM–800), 400 7th Street SW., Washington, DC 20590.

4. No covered employee who holds a part 67 medical certificate shall perform safety-sensitive duties for an employer following a violation until and unless the Federal Air Surgeon has recommended that the employee be permitted to perform such duties.

D. *Notice of refusals.* 1. Except as provided in subparagraph 2 of this paragraph, each employer shall notify the FAA of any covered employee who holds a certificate issued under part 61, part 63, or part 65 who has refused to submit to an alcohol test required under this appendix. Notifications should be sent to: Federal Aviation Administration, Aviation Standards National Field Office, Airmen Certification Branch, AVN–460, P.O. Box 25082, Oklahoma City, OK 73125.

2. An employer is not required to notify the FAA of refusals to submit to pre-employment/pre-duty alcohol tests or refusals to submit to return to duty tests.

E. *Required evaluation and testing.* No covered employee who has engaged in conduct prohibited by § 65.46a, § 121.458, or § 135.253 of this chapter shall perform safety-sensitive functions unless the employee has met the requirements of section VI, paragraph C of this appendix. No employer shall permit a covered employee to perform safety-sensitive functions unless the employee has met the requirements of section VI, paragraph C of this appendix. Nothing in this paragraph shall be construed to prohibit the continued performance of safety-sensitive functions necessary to respond to an emergency.

F. *Other alcohol-related conduct.* 1. No covered employee tested under the provisions of section III of this appendix who is found to have an alcohol concentration of .02 or greater but less than .04 shall perform or continue to perform safety-sensitive functions for an employer, nor shall an employer permit the employee to perform or continue to perform safety-sensitive functions, until:

(a) The employee's alcohol concentration measures less than .02; or

(b) The start of the employee's next regularly scheduled duty period, but not less than 8 hours following administration of the test.

2. Except as provided in subparagraph 1 of this paragraph, no employer shall take any action under this rule against an employee based solely on test results showing an alcohol concentration less than .04. This does not prohibit an employer with authority independent of this rule from taking any action otherwise consistent with this law.

3. Nothing in this paragraph shall be construed to prohibit the continued performance of safety-sensitive functions necessary to respond to an emergency.

VI. Alcohol Misuse Information, Training, and Referral

A. *Employer obligation to promulgate a policy on the misuse of alcohol.* 1. *General requirements.* Each employer shall provide educational materials that explain these alcohol misuse requirements and the employer's policies and procedures with respect to meeting those requirements. Each employer shall provide written notice to every covered employee and to representatives of employee organizations of the availability of this information.

2. *Required content.* The materials to be made available to employees shall include detailed discussion of at least the following:

(a) The identity of the person designated by the employer to answer employee questions about the materials.

(b) The categories of employees who are subject to the provisions of these alcohol misuse requirements.

(c) Sufficient information about the safety-sensitive functions performed by those employees to make clear what period of the work day the covered employee is required to be in compliance with these alcohol misuse requirements.

(d) Specific information concerning employee conduct that is prohibited by this chapter.

(e) The circumstances under which a covered employee will be tested for alcohol under this appendix.

(f) The procedures that will be used to test for the presence of alcohol, protect the employee and the integrity of the breath testing process, safeguard the validity of the test results, and ensure that those results are attributed to the correct employee.

(g) The requirement that a covered employee submit to alcohol tests administered in accordance with this appendix.

(h) An explanation of what constitutes a refusal to submit to an alcohol test and the attendant consequences.

(i) The consequences for covered employees found to have violated the prohibitions in this chapter, including the requirement that the employee be removed immediately from performing safety-sensitive functions, and the procedures under section VI of this appendix.

(j) The consequences for covered employees found to have an alcohol concentration of .02 or greater but less than .04.

(k) Optional provisions. The materials supplied to covered employees may also include information on additional employer policies with respect to the use or possession of alcohol, including any consequences for an employee found to have a specified alcohol level, that are based on the employer's authority independent of this appendix. Any such additional policies or consequences must be clearly and obviously described as being based on independent authority.

B. *Training for supervisors.* Each employer shall ensure that persons designated to determine whether reasonable suspicion exists to require a covered employee to undergo alcohol testing under section II of this appendix receive at least 60 minutes of training on the physical, behavioral, speech, and performance indicators of probable alcohol misuse.

C. *Referral, evaluation, and treatment.* 1. Each covered employee who has engaged in conduct prohibited by § 65.46a, § 121.458, or § 135.253 of this chapter shall be advised by the employer of the resources available to the employee in evaluating and resolving problems associated with the misuse of alcohol, including the names, addresses, and telephone numbers of substance abuse professionals and counseling and treatment programs.

2. Each covered employee who engages in conduct prohibited under § 65.46a, § 121.458, or § 135.253 of this chapter shall be evaluated by a substance abuse professional who must determine what assistance, if any, the employee needs in resolving problems associated with alcohol misuse.

3. (a) Before a covered employee returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited by § 65.46a, § 121.458, or § 135.253 of this chapter, the employee shall undergo an alcohol test with a result indicating an alcohol concentration of less than .02.

(b) In addition, each covered employee identified as needing assistance in resolving problems associated with alcohol misuse—

(i) Shall be evaluated by a substance abuse professional to determine whether the employee has properly followed any rehabilitation program prescribed under subparagraph 2 of this paragraph, and,

(ii) Shall be subject to unannounced follow-up tests administered by the employer following the employee's return to duty. The number and frequency of such follow-up testing shall be determined by a substance abuse professional, but shall consist of at least six tests in the first 12 months following the employee's return to duty. Follow-up testing shall not exceed 60 months from the date of the employee's return to duty. The substance abuse professional may terminate the requirement for follow-up testing at any time after the first six tests have been administered, if the substance abuse professional determines that such testing is no longer necessary.

4. Evaluation and rehabilitation may be provided by the employer, by a substance abuse professional under contract with the employer, or by a substance abuse professional not affiliated with the employer. The choice of substance abuse professional and assignment of costs shall be made in accordance with employer/employee agreements and employer policies.

5. The requirements of this paragraph with respect to referral, evaluation, and

rehabilitation do not apply to applicants who refuse to submit to or have a pre-employment/pre-duty test with a result indicating an alcohol concentration of .04 or greater.

VII. Employer's Alcohol Misuse Prevention Program Plan

A. *Schedule for submission of plans and implementation.* 1. Each employer shall submit an alcohol misuse prevention program (AMPP) plan to the FAA on a form and in a manner prescribed by the Administrator. Plans should be submitted to the FAA, Office of Aviation Medicine, Drug Abatement Division (AAM–800), 400 7th Street SW., Washington, DC 20590, by certified U.S. mail, return receipt requested, in accordance with the schedule below.

(a) Each employer who holds a part 121 certificate, each employer who holds a part 135 certificate and directly employs more than 50 covered employees, and each air traffic control facility affected by this rule shall submit an AMPP plan to the FAA by [6 months after the effective date of the final rule]. Each employer must implement an approved AMPP by [12 months after the effective date of the final rule]. Contractor employees to these employers must be subject to an FAA-approved AMPP by [14 months after the effective date of the final rule].

(b) Each employer who holds a part 135 certificate and directly employs from 11 to 50 covered employees shall submit an AMPP plan to the FAA by [12 months after the effective date of the final rule]. Each employer must implement an approved AMPP by [18 months after the effective date of the final rule]. Contractor employees to these employers must be subject to an FAA-approved AMPP by [20 months after the effective date of the final rule].

(c) Each employer who holds a part 135 certificate and directly employs ten or fewer covered employees, and each operator as defined in 14 CFR 135.1(c) shall submit an AMPP plan to the FAA by [18 months after the effective date of the final rule]. Each employer must implement an approved AMPP by [24 months after the effective date of the final rule]. Contractor employees to these employers must be subject to an FAA-approved AMPP by [26 months after the effective date of the final rule].

2. A company providing covered employees by contract to employers may submit an AMPP plan directly to the FAA for approval on a form and in a manner prescribed by the Administrator. Each contractor company shall implement its approved AMPP in accordance with its terms and the provisions of this appendix.

(a) The FAA may revoke its approval in the case of any contractor company that fails to properly implement its AMPP.

(b) No employer shall use a contractor company's employee who is not subject to the employer's AMPP unless the employer has first determined that the employee is subject to another FAA-approved AMPP.

3. A consortium may submit a core AMPP plan directly to the FAA for approval on a form and in a manner prescribed by the Administrator. Each consortium shall implement its approved plan in accordance with its terms and the provisions of this appendix.

(a) The FAA may revoke its approval in the case of any consortium that fails to properly implement its AMPP.

(b) Each employer that participates in an FAA-approved consortium remains individually responsible for ensuring compliance with the provisions of these alcohol misuse requirements and must maintain all records required under section IV of this appendix.

(c) Each consortium shall notify the FAA of any membership termination within 10 days of such termination.

4. Any person who applies for a certificate under the provisions of part 121 or 135 of this chapter after [the effective date of the final rule] shall submit an alcohol misuse prevention program (AMPP) plan to the FAA for approval and must obtain such approval prior to beginning operations pursuant to the certificate. The AMPP shall be implemented concurrently with beginning such operations or by the date specified in paragraph A.1 of this section, whichever is later. Contractor employees to a new certificate holder must be subject to an FAA-approved AMPP within 60 days of the implementation of the employer's AMPP.

5. Any person who intends to begin sightseeing operations as an operator under 14 CFR 135.1(c) after [the effective date of the final rule] shall, not later than 60 days prior to the proposed initiation of such operations, submit an alcohol misuse prevention program (AMPP) plan to the FAA for approval. No operator may begin conducting sightseeing flights prior to receipt of the FAA's approval of the AMPP plan; the AMPP shall be implemented concurrently with the inception of operations or by the date specified in paragraph A.1 of this section, whichever is later. Contractor employees to a new operator must be subject to an FAA-approved AMPP within 60 days of the implementation of the employer's AMPP.

7. Each employer or contractor company that submits an AMPP plan to the FAA shall consider its plan to be approved unless notified to the contrary by the FAA within 60 days of the date the plan was received at the FAA as reflected on the certified mail receipt.

8. Each consortium that submits a core AMPP plan to the FAA for approval must receive the express written approval of the plan from the FAA prior to submitting rider plans or performing services under the plan.

9. Each employer, and each contractor company that submits a plan directly to the FAA, shall notify the FAA of any proposed change in status (*e.g.*, join a consortium or another carrier's program, change consortium, etc.) and must receive FAA approval prior to the effective date of such change. The employer or contractor company must ensure that it is continuously covered by an FAA-approved alcohol misuse prevention program.

B. *Required content of AMPP plans.* 1. Each AMPP plan, including a consortium core plan to the extent the consortium will be providing services required under this appendix, shall provide the following information:

(a) The name, address, and telephone number of the plan submitter's AMPP manager;

(b) The evidential breath testing (EBT) device that will be used to conduct alcohol testing under this appendix;

(c) The person(s) or company that will be collecting breath specimens;

(d) The person(s) or company that will be providing EBT training and maintenance;

(e) The name, address, and telephone number of the substance abuse professional who will conduct evaluations under this appendix; and

(f) The name, address, and telephone number of the rehabilitation provider if chosen by the employer.

2. Consortium rider plans shall provide the following information:

(a) The identity of the consortium;

(b) The name, address, and telephone number of the consortium member's AMPP manager; and

(c) Any information otherwise required under paragraph 1., above, that will not be covered by the consortium.

3. Each plan and rider submitter shall provide certification of understanding of and agreement to comply with the provisions of the FAA's alcohol misuse prevention regulations.

4. Any amendments to the information required in paragraphs 1 and 2 above shall be submitted to the FAA for review and approval prior to implementation of the changes. The FAA reserves the right to require employers, consortia, and/or contractor companies to amend previously-approved plans as deemed necessary by the FAA for compliance with this appendix.

VIII. Employees Located Outside the U.S.

A. Each covered employee located outside the territory of the United States who is directly employed by an employer will become subject to the provisions of these alcohol misuse requirements on January 2, 1995; provided, however, that no such employee shall be tested for alcohol misuse while located outside the territory of the United States if the Federal Aviation Administration receives written documentation from an employer that such testing is inconsistent with the laws and regulations of the country in which the employee is located. Employers shall submit copies, in English, of any applicable laws and regulations to the FAA, Office of Aviation Medicine, Drug Abatement Division (AAM–800), 400 7th Street SW., Washington, DC 20590.

B. The provisions of this appendix shall not apply to any person located outside the territory of the United States who performs a safety-sensitive function by contract for an employer.

PART 135—AIR TAXI OPERATORS AND COMMERCIAL OPERATORS

13. The authority citation for part 135 is revised to read as follows:

Authority: 49 U.S.C. 1354(a), 1355(a), 1421–1431, and 1502 (revised, Pub. L. 102–143, October 28, 1991); 49 U.S.C. 106(g) (revised, Pub. L. 97–449, January 12, 1983).

14. In § 135.1 paragraphs (c) and (d) are revised to read as follows:

§ 135.1 Applicability.

* * * * *

(c) For the purpose of §§ 135.249, 135.251, 135.253, 135.255, and 135.353, *operator* means any person or entity conducting non-stop sightseeing flights for compensation or hire in an airplane or rotorcraft that begin and end at the same airport and are conducted within a 25 statute mile radius of that airport.

(d) Notwithstanding the provisions of this part and appendices I and J to part 121 of this chapter, an operator who does not hold a part 121 or part 135 certificate is permitted to use a person who is otherwise authorized to perform aircraft maintenance or preventive maintenance duties and who is not subject to FAA-approved anti-drug and alcohol misuse prevention programs to perform—

(1) Aircraft maintenance or preventive maintenance on the operator's aircraft if the operator would otherwise be required to transport the aircraft more than 50 nautical miles further than the repair point closest to operator's principal place of operation to obtain these services; or

(2) Emergency repairs on the operator's aircraft if the aircraft cannot be safely operated to a location where an employee subject to FAA-approved programs can perform the repairs.

15. Section 135.253 is added to read as follows:

§ 135.253 Misuse of alcohol

(a) This section applies to employees who perform a function listed in appendix J to part 121 of this chapter for a certificate holder or operator (*covered employees*). For the purpose of this section, a person who meets the definition of covered employee in appendix J is considered to be performing the function for the certificate holder or operator.

(b) *Alcohol concentration.* No covered employee shall report for duty or remain on duty requiring the performance of safety-sensitive functions while having an alcohol concentration of .04 or greater. No certificate holder or operator having actual knowledge that an employee has an alcohol concentration of .04 or greater shall permit the employee to perform or continue to perform safety-sensitive functions.

(c) *Under the influence of alcohol.* Notwithstanding the absence of a reasonable suspicion alcohol test under appendix J to part 121 of this chapter, no covered employee shall report for duty or remain on duty requiring the performance of safety-sensitive functions while the employee is under the influence of or impaired by alcohol, as shown by behavior or appearance characteristic of alcohol misuse or by an adverse effect on the employee's ability to perform his or her assigned functions. No certificate holder or operator having actual knowledge that the employee is in violation of this provision shall permit a covered employee to perform or continue to perform safety-sensitive functions.

(d) *On-duty use.* No covered employee shall use alcohol while performing safety-sensitive functions. No certificate holder or operator having actual knowledge that a covered employee is using alcohol while performing safety-sensitive functions shall permit the employee to perform or continue to perform safety-sensitive functions.

(e) *Pre-duty use.* (1) No employee shall perform flight crewmember or flight attendant duties within 8 hours after using alcohol. No certificate holder or operator having actual knowledge that such an employee has used alcohol within 8 hours shall permit the employee to perform or continue to perform the specified duties.

(2) No employee shall perform safety-sensitive duties other than those specified in paragraph (e)(1) of this section within 4 hours after using alcohol. No certificate holder or operator having actual knowledge that such an employee has used alcohol within 4 hours shall permit the employee to perform or continue to perform safety-sensitive functions.

(f) *Use following an accident.* No covered employee who has actual knowledge of an accident involving an aircraft for which he or she performed a safety-sensitive function at or near the time of the accident shall use alcohol for 8 hours following the accident, unless he or she has been given a post-accident test under appendix J of part 121 of this chapter, or the employer has determined that the employee's performance could not have contributed to the accident.

(g) *Refusal to submit to a required alcohol test.* No covered employee shall refuse to submit to a post-accident, random, reasonable suspicion, or follow-up alcohol test required under appendix J to part 121 of this chapter.

16. Section 135.255 is added to read as follows:

§ 135.255 Testing for alcohol.

(a) Each certificate holder and operator must establish an alcohol misuse prevention program in accordance with the provisions of appendix J to part 121 of this chapter.

(b) No certificate holder or operator shall use any person who meets the definition of "covered employee" in appendix J to part 121 to perform a safety-sensitive function listed in that appendix unless such person is subject to testing for alcohol misuse in accordance with the provisions of appendix J.

Issued in Washington, DC, on December 2, 1992.

Andrew H. Card, Jr.,

Secretary of Transportation.

Thomas C. Richards,

Administrator.

[FR Doc. 92-29675 Filed 12-10-92; 10:00 am]

BILLING CODE 4910-13-M

Federal Aviation Administration

14 CFR Parts 121 and 129

[Docket No. 27066; Notice No. 92-18]

RIN 2120-AE79

Anti-Drug Program and Alcohol Misuse Prevention Program for Employees of Foreign Air Carriers Engaged in Specified Aviation Activities

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Advance notice of proposed rulemaking (ANPRM).

SUMMARY: The Omnibus Transportation Employee Testing Act of 1991 directs the FAA Administrator to prescribe regulations that require foreign air carriers to establish drug and alcohol testing programs for employees performing safety-sensitive aviation functions. The regulations must be consistent with the international obligations of the United States and take into consideration any applicable laws and regulations of foreign countries. This notice invites comments on a variety of issues related to the application of drug and alcohol testing requirements to safety-sensitive employees of foreign air carriers operating within the territory of the United States.

DATES: Comments must be received on or before February 16, 1993.

ADDRESSES: Comments on this notice should be mailed, in triplicate, to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rules Docket (AGC-10), Docket No. 27066, 800 Independence Avenue, SW., Washington, DC 20591. Comments that are delivered to this address must be marked "Docket No. 27066." Comments may be examined in Room 915G between 8:30 a.m. and 5 p.m. on weekdays, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Ms. Julie B. Murdoch, Office of Aviation

Medicine, Drug Abatement Division (AAM–800), Federal Aviation Administration, 400 7th Street, SW., Washington, DC 20590; telephone (202) 366–6710.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of a proposed rule by submitting such written data, views, suggestions, or arguments as they may desire. Communications should identify the regulatory docket or notice number and be submitted in triplicate to the address above. All communications received on or before the closing date for comments will be considered by the Administrator before rulemaking action is taken. Persons wishing the FAA to acknowledge receipt of their comments must submit with those comments a self-addressed stamped postcard on which the following statement is made: "Comments to Docket No. 27066." The postcard will be dated and time stamped and returned to the commenter. All comments submitted will be available for review in the Rules Docket, both before and after the comment closing date. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will also be filed in the docket.

Availability of ANPRM

Any person may obtain a copy of this ANPRM by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attn: Public Inquiry Center (APA–230), 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–3484. Requests must include the notice number of this ANPRM.

Persons interested in being placed on a mailing list for future rulemaking actions should request a copy of Advisory Circular 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedures.

Current Laws and Regulations

The FAA has general statutory authority to regulate safety in civil aviation under the Federal Aviation Act of 1958 (the FAAct), as amended. As provided in section 1108 of the FAAct, the United States of America has complete and exclusive national sovereignty in the airspace of the United States (49 App. U.S.C. 1508(a)). However, as a signatory to the Convention on International Civil Aviation (December 7, 1944, 61 Stat. 1180, T.I.A.S. No 1591; hereinafter the Chicago Convention), the United States must exercise that sovereignty with respect to foreign civil aircraft in a manner consistent with the Chicago Convention.

The Chicago Convention stipulates that a member State has complete and exclusive sovereignty as to regulating the operation and navigation of foreign-registered aircraft within its territory. *Id.* arts. 1–2, 12. Regulation of aviation activity that takes place wholly or substantially within the territory of the United States, so long as the regulation is reasonable and takes into consideration applicable foreign laws that may affect the foreign air carriers or their employees, is therefore clearly within the scope of the FAA's authority. The FAA has, for example, prescribed regulations requiring foreign air carrier pilots to be familiar with applicable air traffic and other rules, and directing foreign air carriers to establish procedures to verify such knowledge. (14 CFR 129.19.)

The Chicago Convention does not explicitly permit the extraterritorial application of one State's laws to non-citizens outside the territory of that State; however, States may promulgate regulations regarding entrance into or departure from their territorial boundaries by aircraft. The United States has used this authority, together with the supporting provisions of the Chicago Convention and its Annexes, to regulate foreign air carriers operating into the United States in a number of areas, including airplane security. (14 CFR 129.25.)

In addition to establishing the general rights, privileges, and obligations of the member States engaging in international aviation, the Chicago Convention established the International Civil Aviation Organization (ICAO). An adjunct of the United Nations, the ICAO includes all of the signatories to the Chicago Convention (over 170 countries) and operates through a standing Council comprised of 33 elected States and a General Assembly that meets every three years. ICAO has responsibility for establishing international Standards and Recommended Practices to promote aviation safety. Every member State must adhere to the established Standards, unless the State files a difference with ICAO. States are encouraged, but not required, to comply with Recommended Practices.

As a signatory to the Chicago Convention, the U.S. is bound by its Annex 2 (Rules of the Air), which provides in paragraph 2.5 that

> No person shall pilot an aircraft, or act as a flight crew member of an aircraft, while under the influence of intoxicating liquor or any narcotic or drug, by reason of which that person's capacity so to act is impaired.

Consistent with this standard, the FAA's regulations prohibit any person from acting or attempting to act as a crewmember within 8 hours after consuming any alcoholic beverage, while under the influence of alcohol, while using any drug that affects the person's faculties in a manner contrary to safety, or while having .04 percent by weight or more alcohol in the blood. (14 CFR 91.17(a).) This regulation covers all operations within the territory of the United States, including foreign air carrier operations.

Under Federal criminal law, no person may operate or direct the operation of a common carrier (which includes foreign air carriers operating within the territory of the United States) while under the influence of a controlled substance or alcohol. (18 U.S.C. 342.) An individual with a blood alcohol content of .10 percent or more is presumed to be under the influence of alcohol (18 U.S.C. 343(1)), as is an individual with a quantity of drug in his or her system that would be sufficient to impair the perception, mental processes, or motor functions of the average individual (18 U.S.C. 343(2)).

Many states have similar criminal laws that prohibit any person from operating an aircraft while under the influence of alcohol and/or drugs. Under limited circumstances, the FAA's regulations require persons who are being investigated for violation of these State or local laws to submit to alcohol tests when requested by authorized State or local law enforcement officers, and, upon request, to furnish the test results to the Administrator. (14 CFR 91.17(c).)

On November 21, 1988, the FAA published regulations that require certain employers to establish anti-drug programs for their employees who perform specified safety-sensitive functions (e.g., pilots, flight attendants, and mechanics). In addition to requiring employers to educate employees about the detrimental effects of drug abuse, the FAA's anti-drug rule requires pre-employment, random, post-accident, reasonable cause, and return to duty drug testing. Individuals required to hold airman medical certificates under 14 CFR part 67 are also subject to periodic drug testing. The anti-drug rule is limited in its application, however, to the employees (whether direct or contract) of U.S. employers. Similarly, the proposed alcohol misuse prevention program (which lists the employees who would be subject to alcohol testing), published elsewhere in today's Federal

Register, currently only proposes application to U.S. employers and not to foreign air carriers.

Omnibus Transportation Employee Testing Act

The Omnibus Transportation Employee Testing Act of 1991 (the Act (Pub. L. 102–143, title V)) was enacted on October 28, 1991. Among other things, the Act adds a new section 614 to the FAAct, which requires the FAA Administrator to prescribe regulations under which air carriers and foreign air carriers must establish alcohol and drug testing programs for safety-sensitive employees. The Act specifically provides that the regulations must establish a program which requires air carriers *and* foreign air carriers to conduct drug and alcohol testing of safety-sensitive employees. (Section 3 of the Act, amending title VI of the FAAct (49 App. U.S.C. 1434(a)(1)).) The Act also provides that the requirements applicable to foreign air carriers must be consistent with the international obligations of the United States, and must take into consideration any applicable laws and regulations of foreign countries. (Section 3 of the Act, amending title VI of the FAAct (49 App. U.S.C. 1434(e)(3)).)

As discussed above, the FAA has jurisdiction over the navigation and operations of foreign air carriers within the territory of the United States. The FAA would not propose, for example, to apply its drug and alcohol rules to the performance of safety-sensitive functions by foreign air carrier employees outside the territory of the United States. However, in determining whether and how to impose drug and alcohol testing requirements on such carriers, the FAA must, under the Act, take into consideration not only international obligations of the U.S. such as the Chicago Convention, but also any applicable foreign laws and regulations.

We also recognize the concerns of foreign countries, and are aware of the practical considerations that may arise as we implement the provisions of the Act with respect to foreign air carriers. For these reasons, the FAA is issuing this ANPRM, rather than a notice of proposed rulemaking, to seek the public's views on a variety of issues and responses to questions that may arise in addressing drug and alcohol testing by foreign air carriers. The Act similarly amended the statutes applicable to the Federal Railroad Administration (FRA) and the Federal Highway Administration (FHWA). These amendments, and the possible implications for the rail and commercial motor vehicle industries, are addressed in ANPRMs specific to each industry published elsewhere in today's Federal Register. It is the intent of the Department to foster consistency to the extent possible in prescribing regulations implementing these similar statutory provisions.

In a provision specific to the FAA, the Act directed the Secretaries of State and Transportation to call on the member countries of the ICAO to strengthen and enforce existing standards to prohibit the use, in violation of law or Federal regulation, of alcohol or a controlled substance by crew members in international civil aviation. *Id.* On September 30, 1992, a resolution offered by the United States and co-sponsored by a number of other countries was introduced at the 29th General Assembly of ICAO in furtherance of this legislative directive (ICAO Document A29–WP/67; EX/17; 3/9/92). The resolution was approved by the Assembly and states that the Assembly:

1. *Declares* its strong support for making and maintaining civil aviation workplaces free of substance abuse and encourages cooperative efforts throughout the international civil aviation community to educate employees on the dangers of substance abuse, and to take steps, when deemed necessary, to detect and deter such use, and through such efforts, to ensure that substance abuse never becomes prevalent or tolerated within civil aviation;

2. *Urges* the Council to accord a high degree of priority * * * to expediting the development and publication of guidance material containing measures which may be implemented by Contracting States * * *;

3. *Requests* the Council to continue its effort to monitor:

(a) the existence and growth of the threat to the safety of international civil aviation posed by substance abuse; and

(b) efforts by Contracting States to implement preventive measures; and

4. *Requests* the Council to present a report on the implementation of this Resolution to the next ordinary session of the Assembly.

The willingness of the member States of ICAO to adopt this resolution indicates the degree to which substance abuse is recognized as a threat to international civil aviation safety. Although the methods chosen to address substance abuse problems will inevitably vary by State, the United States has at present identified substance abuse testing as a useful tool for detecting and deterring use of illegal drugs and misuse of alcohol.

General Problems and Issues

The following general problems and issues have been identified in assessing the implications of the Act's testing provisions. In responding to the questions and requests for comment below, we ask that commenters distinguish responses relating to alcohol testing from those relating to drug testing, where the same response is not appropriate for both.

1. International Agreements and Foreign Laws

We have set forth above the FAA's interpretation of the international law pertaining to the imposition of substance abuse testing requirements on foreign air carriers under U.S. regulations. We are aware, however, that commenters may have different perspectives. We seek further information on any bilateral or multilateral obligations of the U.S., or principles of customary international law, that may affect our implementation of the Act. If there are any international agreements under development that would affect drug and alcohol testing of foreign air carriers, we also seek information on them. In commenting on international obligations of the U.S., we request that commenters focus on any provisions that affect the ability of the United States to require testing of employees conducting operations in the U.S., with the testing to take place in the United States.

In addition to international obligations, we seek comment on any laws or regulations of foreign countries that we should take into account in implementing the Act. We would like to obtain information on any laws or rules, with English-language translations, of specific foreign countries whose foreign air carriers conduct operations within the territory of the U.S. that we should consider.

2. Pre-employment and Follow-Up Testing

Often, employees of foreign air carriers are recruited and hired in the foreign country involved. For example, a Canadian employer may hire Canadian nationals in Canada, some of whom will subsequently conduct operations in the United States. The employer may not know, at the time of hire, which of its employees will perform safety-sensitive functions within the territory of the United States.

In such a situation, should the employer be required to conduct any pre-employment testing? If so, how, when, and where would the foreign air carrier conduct pre-employment testing of the employees who were to perform safety-sensitive functions in the United States? Should all pre-employment testing be conducted in the U.S., or should any proposed rules permit the employer to conduct tests in its own country?

If an employee tests positive on any type of alcohol or drug test, the FAA's existing and proposed rules generally require a return to duty test and follow-up tests, over a period of time. For an employee based outside of the territory of the United States who comes into the U.S. occasionally, questions similar to those mentioned above for pre-employment testing may arise. If the foreign air carrier does not conduct the tests in its own country, should we require the foreign air carrier to arrange for the required tests to take place in the United States?

3. Random Testing

Under the FAA's current anti-drug rule, to meet random testing rate requirements, employers have to conduct a certain number of tests per year (*e.g.*, under a 50 percent random testing rate, a number of tests each year equivalent to half the number of the employees in the random pool). Should all of a foreign air carrier's covered employees who perform safety-sensitive functions within the territory of the U.S. at any time have to be part of a random testing pool? Could a true random testing program be developed that would provide for testing only within the territory of the United States? How would foreign air carriers arrange for the unannounced, random testing of their employees only in U.S. territory?

Are there circumstances in which foreign air carriers should not be subject to a random testing requirement at all?

4. Requirement for All Types of Tests

The Act specifically requires four types of substance abuse testing by covered employers: Pre-employment, random, reasonable suspicion, and post-accident. Periodic testing associated with an airman medical examination is discretionary on the part of the Administrator. Should the FAA refrain from requiring foreign air carriers to conduct certain kinds of tests? The FAA anticipates little problem with requiring a post-accident or reasonable suspicion test in the U.S., following an accident or basis for reasonable suspicion that occurred in this country. At the 29th General Assembly of ICAO, the only organization to oppose the U.S.-sponsored substance abuse resolution—the International Federation of Air Line Pilots' Associations—recognized the usefulness of both types of tests.

However, as discussed above, there may be problems with requiring foreign air carriers to conduct other forms of testing (*e.g.*, random). Should the FAA exclude foreign air carriers from some or all types of alcohol or drug testing? Why or why not? Should the legal authority of the foreign air carrier to conduct a certain kind of testing in its own country be considered in deciding whether to exclude foreign air carriers from a certain country from a requirement to conduct testing within the United States? If some exclusions are desirable, how could such exclusions be reconciled with the testing requirements of the Act? Should the FAA consider requiring different types of tests depending on where the foreign air carrier employees were based (*e.g.*, impose all types of tests on U.S.-based employees, but only reasonable suspicion and post-accident on employees based outside the U.S. when they are performing safety-sensitive functions within the territory of the U.S.)?

5. Other Compliance Activities

The FAA's current anti-drug rule and proposed alcohol misuse rule have a variety of other program requirements in addition to testing. These requirements pertain to employee assistance and training programs, substance abuse professionals, record retention, data reporting, plan submission, and others. Some of these activities or functions could be accomplished most conveniently in the foreign air carrier's country. Should some or all of the foreign air carrier's program activities be required or permitted to take place outside the territory of the United States?

How would the FAA monitor and enforce compliance with anti-drug or alcohol program activities that take place outside the United States? What problems are possible in gaining access by FAA personnel to information about the foreign air carriers' implementation of program and testing requirements?

6. Testing Procedures

Under the FAA's anti-drug rule, all testing must be conducted in accordance with the procedures established by the Office of the Secretary of Transportation (OST) in 49 CFR part 40. The proposed alcohol misuse rule would include a similar requirement to conduct alcohol testing in accordance with the procedures proposed by OST. Ensuring compliance with these procedures could raise a number of problems if any testing or collection is performed outside the territory of the United States. Should there be a method of accepting evidence of compliance with a foreign country's testing procedures in lieu of some or all of the 49 CFR part 40 procedures, if testing is permitted to be conducted outside of U.S. territory?

All urine specimens collected under the FAA's anti-drug rule must be analyzed at a laboratory certified by the National Institute on Drug Abuse (NIDA), all of which are in the United States. Unless this requirement is changed, specimens collected outside the U.S. for drug testing under the FAA's rule would have to be sent to these laboratories for analysis. This poses some obvious practical problems (*e.g.*, timeliness of transmission of specimens and associated paperwork, possible difficulties with U.S. Customs). Are there other such problems? We seek comment on how the practical problems could be solved. If specimen collection for drug testing or alcohol testing is permitted to be conducted outside the U.S., how could the possible language or training problems be overcome (*e.g.*, translations of DOT requirements or forms)?

In FAA-mandated drug testing, there is a requirement for medical review officers to verify positive tests and perform other functions. Should MROs (who, under current rules, must be physicians licensed in the U.S.) have to perform these functions, or should physicians licensed in the foreign countries involved be able to serve as MROs? Could the requirements for MROs pose particular problems in countries with scarce medical resources? The same questions can be asked for substance abuse professionals who would evaluate people who test positive for drugs or who misuse alcohol. If personnel licensed in the U.S. were required for this function, would this create difficult logistical problems for the program?

As proposed, alcohol testing would have to be conducted using evidential breath testing devices (EBTs) on the National Highway Transportation Safety Administration's Conforming Products List. Would there be problems in obtaining or using such EBTs in other countries, if testing is permitted to be conducted outside the territory of the United States?

The FAA seeks comment on any other problems related to the testing procedures that may occur in the context of testing by foreign air carriers. We are aware, for example, that there may be cultural impediments in some countries to the provision of urine for testing. Other countries may regulate forensic testing in a way that could affect the ability of foreign air carriers to comply with the provisions of 49 CFR part 40.

7. Required Consequences

Under the FAA's anti-drug rule the consequence of refusing to submit to a

drug test or failing a drug test is removal from a safety-sensitive position, until the employee follows the rule's procedures for returning to the performance of safety-sensitive duties. The alcohol misuse NPRM proposes similar consequences. However, the application of the anti-drug and alcohol misuse rules to foreign air carriers would be intended only to affect operations within the United States. Therefore, the FAA would not propose to prohibit the performance of safety-sensitive functions outside the territory of the U.S. by a foreign air carrier employee who, for example, failed a drug test. Such an employee would, however, be prohibited from conducting any safety-sensitive functions in the U.S. until the employee met the FAA's return to duty requirements. How would foreign air carriers ensure that an employee who failed or refused a drug or alcohol test or engaged in other alcohol misuse did not engage in operations in the U.S., until return to duty requirements had been met? How would the FAA monitor compliance with this requirement?

8. Costs

We are specifically seeking information from foreign air carriers on the number of employees who would be affected by a requirement to test persons performing safety-sensitive functions within the territory of the U.S. for foreign air carriers. Do commenters anticipate that foreign air carriers' positive test rates for the employees who would be subject to any proposed rules (which can affect costs significantly) would be higher, lower, or about the same as the positive test rates of comparable U.S. employers? What would be the costs of the anti-drug and alcohol misuse program activities that could occur outside the U.S. that the FAA should consider in estimating the costs of the rule? Are there any costs that would be unique to such program activities? Are there any positive or negative trade or competitive effects of testing (or not testing) employees of foreign air carriers, for either U.S. or foreign companies?

Regulatory Process Matters

Economic Impact

The FAA is unable to determine at this point what the likely costs of implementing the Act with respect to foreign air carriers might be, nor the annual effect on the economy. Following a review of the comments submitted to this ANPRM, the FAA will determine what regulatory requirements will be proposed. At that time the FAA will review the potential costs and benefits, as required by Executive Order 12291. As discussed above, we are seeking relevant cost data to facilitate the FAA's determinations.

Significance

This anticipated rulemaking is not "major" as defined in Executive Order 12291. It does involve issues of substantial interest to the public, however, and the FAA has therefore determined that the ANPRM is significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034; February 2, 1979).

Other Regulatory Matters

At this preliminary stage, it is not yet possible to determine whether there will be a significant economic impact on a number of small entities, what the paperwork burden might be, or whether there will be any federalism implications. Each of these regulatory matters will be addressed fully at the time of publication of any notice of proposed rulemaking on this subject.

List of Subjects

14 CFR Part 121

Air carriers, Air transportation, Aircraft, Aircraft pilots, Airmen, Airplanes, Alcohol, Alcoholism, Aviation safety, Drug abuse, Drugs, Narcotics, Pilots, Safety, Transportation.

14 CFR Part 129

Air carriers, Air transportation, Aircraft, Aircraft pilots, Airmen, Airplanes, Alcohol, Alcoholism, Aviation safety, Drug abuse, Drugs, Foreign air carriers, Narcotics, Pilots, Safety, Transportation.

Authority: 49 U.S.C. 1346, 1354(a), 1355, 1356, 1357, 1401, 1421–1430, 1485, 1502, 1511, and 1522 (revised, Pub. L. 102–143, October 28, 1991); 49 U.S.C. 106(g) (revised, Pub. L. 97–449, January 12, 1983).

Issued in Washington, DC, on December 2, 1992.

Andrew H. Card, Jr.,

Secretary of Transportation.

Thomas C. Richards,

Administrator.

[FR Doc. 92-29676 Filed 12-10-92; 10:00 am]

BILLING CODE 4910-13-M

14 CFR Part 121

[Docket No. 25148; Notice No. 92–19]

RIN 2120–AC33

Anti-Drug Program for Personnel Engaged in Specified Aviation Activities

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: On November 21, 1988, the Federal Aviation Administration (FAA) published a final rule requiring specified aviation employers to implement anti-drug programs for personnel performing sensitive safety- and security-related functions. That final rule includes recordkeeping and reporting requirements. In response to a Department of Transportation (DOT) Notice of Proposed Rulemaking (NPRM), published elsewhere in today's **Federal Register**, that would establish a standard Management Information System for the Department's drug testing programs, this NPRM proposes modifications to the FAA's record-keeping and reporting requirements. The amendments proposed here would conform the FAA's requirements to those in the DOT NPRM and provide the FAA with needed additional data for use in monitoring the anti-drug program.

DATES: Send or deliver comments by April 14, 1993.

ADDRESSES: Send or deliver comments on this notice, in triplicate, to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rules Docket (AGC–10), room 915G, Docket No. 25148, 800 Independence Avenue, SW., Washington, DC 20591. Persons wishing the FAA to acknowledge receipt of their comments should submit with those comments a pre-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 25148." The postcard will be dated and time stamped and returned to the person submitting the comment. Comments may be examined in the Rules Docket between 8:30 a.m. and 5 p.m. on weekdays, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Carol Daugherty, Office of Aviation Medicine, Drug Abatement Division (AAM–800), Federal Aviation Administration, 400 Seventh Street, SW., Washington, DC 20590; telephone (202) 366–6710.

SUPPLEMENTARY INFORMATION:

General

Interested persons are invited to participate in the development of the proposed rule by submitting such written information, views, or arguments as they may desire. Comments relating to the environmental, energy, federalism, or economic impact that might result from adopting the proposals in this notice are invited. Substantive comments should be accompanied by cost estimates. Comments should identify the regulatory docket or notice number and should be submitted in triplicate to the Rules Docket address specified above. All comments received on or before the closing date for comments specified will be considered by the Administrator before taking action on this proposed rulemaking. Comments filed late will be considered to the extent practicable. The proposals contained in this notice may be changed in light of comments received. All comments received will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM

Any person may obtain a copy of this NPRM by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attn: Public Inquiry Center (APA–230), 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–3484. Requests must include the notice number identified in this NPRM. Persons interested in being placed on a mailing list for future rulemaking actions should request a copy of Advisory Circular 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedures.

Background

Definitions

The following definitions apply to terms used throughout this notice of proposed rulemaking (NPRM):

FAA's current rule (or *the FAA final rule*) is the FAA's anti-drug rule, as amended, now in effect. This rule, entitled "Anti-Drug Program for Personnel Engaged in Specified Aviation Activities," was published in 53 FR 47024 (November 21, 1988), and amended 14 CFR parts 61, 63, 65, 121 and 135.

Employee category means a category of employees who must be subject to drug testing under the final rule (14 CFR part 121, appendix I, section III). The employee categories in the final rule (and this NPRM) are employees who perform the following functions: Flight crewmembers; flight attendants; flight or ground instructors; flight testing personnel; aircraft dispatchers; maintenance or preventive maintenance personnel; security or screening personnel; and air traffic control personnel.

Test category or *type of test* are synonymous and refer to the types of drug testing required by the FAA final rule: pre-employment, periodic, random, post-accident, reasonable cause, and return-to-duty. For further information regarding the types of tests, refer to 14 CFR part 121, appendix I, section V.

The Department Of Transportation NPRM

This NPRM responds to a Department of Transportation (DOT) NPRM which proposes that employers in all segments of the transportation industry maintain and submit standardized drug program information as specified in the rules of the appropriate DOT operating administration (OA). Information compiled by the FAA would be incorporated into a comprehensive, DOT-wide anti-drug program Management Information System (MIS). The proposed changes to the FAA's current reporting requirements would support the DOT's goal of establishing a systematic, standardized program to collect, analyze, and interpret anti-drug program information. The data provided through the MIS is intended to be the basis for monitoring implementation of and compliance with the anti-drug rule, and for evaluating the effectiveness of the OAs' anti-drug programs as well as the overall effectiveness of the DOT's program.

Today's **Federal Register** also contains related NPRMs issued pursuant to DOT's NPRM by each of the other DOT operating administrations that have drug testing rules [Federal Railroad Administration (FRA), United States Coast Guard (USCG), Research and Special Programs Administration (RSPA), Federal Highway Administration (FHWA)], as well as the DOT NPRM.

The FAA NPRM (Anti-Drug Management Information System)

The FAA final rule requires aviation employers to submit drug testing reports as specified in section X of appendix I to 14 CFR part 121. In accordance with the DOT's NPRM, the FAA proposes to modify the reporting requirements for aviation employers in this NPRM. These employers receive information from forensic laboratories, medical review officers, and specimen collection agents/facilities and therefore can provide the necessary cumulative data for the DOT's MIS program.

Issues Relating to Record Keeping and Reporting Procedures

In the following sections, the FAA has compared the record keeping and reporting procedures of the final rule, the DOT NPRM, and the FAA's proposals in this NPRM.

1. *Reporting by a Representative Sample of Employers.* The FAA final rule requires *all* affected aviation employers to submit semiannual and annual reports. Under the DOT NPRM, although each employer or employer's representative must maintain the data required by each OA's rule, the OAs could select a representative sample of employers who must submit reports to the OA. The FAA does not propose to adopt a representative sample reporting technique at this time. Confirmation of actual drug testing levels and other program elements through official reports from the aviation employer is an important aspect of compliance monitoring. Therefore, the FAA proposes to continue to require submission of reports from all affected aviation employers, unless an employer is otherwise expressly authorized by the FAA not to submit a report.

2. *Reporting by Employee Category.* The FAA final rule requires aviation employers to conduct drug testing and report to the FAA the results regarding specific employee categories or positions tested. The DOT NPRM proposes to permit each OA to require that drug testing information be reported either by employee categories or by other categories established for reporting purposes. The FAA NPRM proposes to continue to require reporting by employee categories, as established in the final rule. The possible addition or deletion of covered employee positions or categories would be deferred.

3. *Reporting by Consortia.* The FAA final rule requires all covered employers, even those that belong to a consortium, to submit required reports directly to the FAA. Under the DOT NPRM, the FAA could permit consortia to submit reports for their member companies directly to the FAA. The FAA proposes to adopt this procedure; however, even if a consortium prepares and submits a report for an employer, the employer would remain responsible for the accuracy and timeliness of the submission.

4. *Employers Affected by More than One OA.* An aviation employer subject to the FAA anti-drug rule whose employees are also subject to the anti-drug rule of another OA must submit data to each regulating OA for those employees covered by that OA rule. This could occur in a number of ways, for example:

a. The employer may have one group of employees who *only* perform functions covered by the FAA and other employees who only perform functions covered by another OA; or

b. The employer may have individual employees who perform functions covered by two or more OAs.

In the first situation, the groups of employees are independent and distinct. The employer is subject to the requirements of separate OAs, but the individual employee is subject to the requirements of only one OA. Under the current rule, the employer must implement an FAA-approved anti-drug program for the employees performing FAA covered functions. A separate anti-drug program covers those employees who are subject to the requirements of another OA rule. With respect to reporting to the FAA, employers may not include information about employees who do not perform a covered aviation function. The reporting of information pertaining to employees covered by the FAA's rule would not be affected by the reporting requirements of this NPRM. Reports pertaining to aviation employees are directed to the FAA; reports pertaining to employees affected by another OA are directed to that OA.

In the second situation, the individual employee is subject to the requirements of different OAs during the performance of duty. The current rule requires that employees who perform functions covered by the FAA rule be subject to an FAA-approved anti-drug program, regardless of whether the affected employees might be subject to the requirements of another OA's rule. This NPRM proposes to make the following change: for employees who perform functions covered by more than one OA, employers would identify the covered position under which the employee would be categorized, and to which OA the results would be reported. The identification would be accomplished on the new FAA annual reporting form.

Employers would continue to report information pertaining to drug tests conducted under the auspices of the FAA anti-drug rule only to the FAA. The employer would have to determine whether the test is conducted pursuant to FAA requirements or the requirements of another OA. Based on that determination, the report would be directed to the appropriate OA.

For employees subject to the requirements of more than one OA, employers would notify employees that a single drug test (for example, a pre-employment test) may be administered to satisfy the requirements of more than one OA.

5. *Alternative Reporting Methods.* The FAA final rule requires that all drug tests conducted under the FAA anti-drug program be included in the semiannual and annual reports. The DOT NPRM proposes to allow an OA to elect to acquire any of the MIS information elements through alternative methodology (for example, through separately-required post-accident reports). The FAA does not propose to acquire information through alternative means at this time. Although the FAA reporting system is still being developed, it has proven to be both practical and efficient. The FAA seeks to avoid the significant possibility that error may be introduced through the use of alternative reporting methods.

6. *Annual Reporting.* The FAA final rule requires aviation employers to submit semiannual and annual reports. The DOT NPRM proposes that program information be submitted on an annual basis, or more frequently if required by the OA's rules. The FAA proposes to eliminate the semiannual reporting requirement and require aviation employers to submit an annual report only. The report would cover the calendar year January 1 through December 31 and would be submitted by February 15 following the reporting period.

7. *Transmission of Reports Electronically.* The DOT NPRM requests comments on the usefulness of transmitting reporting data electronically through the Anti-Drug Information Center (ADIC). The FAA is interested in employers' comments on the use of the ADIC for this purpose.

Proposed Recordkeeping and Reporting Requirements

The DOT NPRM requires each operating administration to submit consolidated industry data, which must include the data elements specified in the NPRM. Therefore, the FAA proposes to require that employers provide the following data to the FAA:

1. Number of covered employees by employee category. This information is necessary to assess the scope of the rule's application and provide a basis for determining the level of random testing being conducted.

2. Employees covered by more than one OA. The employer would identify, and report upon the employees who were affected by the provisions of the FAA's and at least one other OA's anti-drug rule due to the multiple functions performed by the employee. Through employer disclosure of this information, the FAA and DOT would be able to ascertain the size of the dual covered population.

3. Number of specimens collected by type of test and employee category. This information would provide the scope of drug testing in the categories specified by the anti-drug rule and is necessary for reviewing the collection, testing, and review process.

4. Number of positive drug test results verified by a Medical Review Officer (MRO) by type of test, type of drug, and employee category. This information, along with the number of tests performed, would permit the calculation of positive rates necessary to determine the extent of drug use and the specific drugs detected in the various categories of employees. Further, analysis of this information over time would provide a measure of the effectiveness of the anti-drug rule in deterring drug abuse.

5. Number of negative tests verified by a MRO by type of test, and employee category. This data is needed to check compliance with the rules by category and to review the application of the components of the programs.

6. Number of persons denied a position as a covered employee based on verified positive tests. This information would provide an assessment of whether the testing program is being implemented as required, provide a measure of the impact of the FAA anti-drug rule on the aviation industry, and yield information on the prevalence of drug abuse in the applicant pool.

7. Number of employees with tests verified positive by a MRO, who were returned to duty in covered positions (currently in or having completed rehabilitation or otherwise qualified for duty during the reporting period). This information would show employer policies regarding rehabilitation of identified drug abusers.

8. Number of employees with tests verified positive by a MRO for more than one drug. This information would show the extent of multiple drug abuse in the aviation industry.

9. Number of covered employees who refused to submit to a drug test and the action taken in response to the refusal(s). This information would help determine appropriate certificate action on individuals who refuse to submit to testing.

10. Number of covered employees and supervisors who have received required training during the reporting period. This information would provide a cumulative count of covered employees and supervisory personnel who have received the required drug abuse education and training as of December 31st of each year.

The FAA has developed a standard form for use by employers to provide to the FAA the information required by this proposed regulation. The FAA standard form and a detailed set of instructions for correctly completing the form are attached to this NPRM. Although the proposed standard DOT format would make each OA form similar, there could be differences from one OA to the next. Therefore, aviation employers would use only the FAA standard form. As of the publication of the FAA final rule resulting from this NPRM with the attached FAA standard form, no other form would be accepted by the FAA unless expressly authorized by the FAA.

Regulatory Analyses and Notices

Executive Order 12291 and DOT Regulatory Policies and Procedures

This proposal is not "major" under Executive Order 12291. It is significant under the Department of Transportation's Regulatory Policy and Procedures.

Economic Evaluation

Executive Order 12291, dated February 17, 1981, directs Federal agencies to promulgate new regulations or modify existing regulations only if the potential benefits to society for the regulatory change outweigh the potential costs to society. In accordance with the requirements of Executive Order 12291, the FAA reviewed the costs and benefits of the final anti-drug rule issued on November 14, 1988. At that time, the FAA prepared a comprehensive Regulatory Evaluation of the final anti-drug rule. The FAA also summarized and analyzed the comments submitted by interested persons on the economic issues in the final rulemaking document published in the Federal Register on November 21, 1988.

The original analysis of the anti-drug rule considered the costs and benefits for all affected employers and concluded that the overall rule, which included much of the information required under this proposed change, had a positive cost-benefit ratio.

This proposed rulemaking would conform the FAA's anti-drug program reporting requirements to standardized reporting requirements proposed for each of the other OA's by the DOT NPRM. The purpose is to provide DOT and the FAA with critical program information in order to make necessary procedure and program evaluations. These evaluations could lead to policy changes to make the rule more effective, which would in turn enhance public safety. The information would provide valuable detail to evaluate the cost/benefit effect of the anti-drug program.

This proposed action could result in a modest increase in the recordkeeping cost of the final rule because the aviation employer would be required to compile and submit information in greater detail than required previously. However the elimination of a reporting requirement (semiannual report) would result in a decreased cost to the employer. In addition, once the aviation employer becomes familiar with the reporting format, preparation of successive reports would become less time-consuming. Finally, the DOT has developed a format, and the FAA has developed a specific form, with instructions that can be used to reduce the costs of compliance. Therefore, the FAA has tentatively concluded any potential effect on costs would be minimal. However, comments addressing potential increased costs are invited from the industry. A revision of the comprehensive Regulatory Evaluation and the preparation of a separate economic evaluation for this amendment is not warranted.

Paperwork Reduction Act Approval

The recordkeeping and reporting requirements of the final anti-drug rule, issued on November 14, 1988, were previously submitted to the Office of Management and Budget (OMB) for approval in accordance with the Paperwork Reduction Act of 1980, and assigned OMB control number 2120–0535.

The paperwork clearance package, 2120–0535, will be amended to reflect the burden associated with this NPRM, and submitted to OMB for approval. Following is a synopsis of the paperwork/recordkeeping burden associated with this NPRM:

DOT No.:

OMB No.: 2120–0535.

Title: Anti-Drug Program for Personnel Engaged in Specified Aviation Activities.

Need For Information: The information is needed to respond to a DOT NPRM which proposes that employers in all segments of the transportation industry maintain and submit standardized anti-drug program information.

Proposed Use of Information: The information submitted is intended to be the basis for monitoring aviation industry implementation of and compliance with the anti-drug rule, and for evaluating the effectiveness of the FAA anti-drug program.

Frequency: Annually.

Burden Estimate: 32,742 hours.

Respondents: Specified aviation employers.

Average Burden Hours Per Respondent: 2.5 hours.

Trade Impact Statement

This proposed rulemaking would affect only domestic aviation operations performed under the provisions of the Federal Aviation Regulations (FAR); therefore, it would have no impact on trade opportunities for United States firms doing business overseas or foreign firms doing business in the United States.

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) was enacted by Congress to ensure that small business entities are not unnecessarily or disproportionately burdened by Government regulations. The FAA certifies that this proposal would not have a significant economic impact, positive or negative, on a substantial number of small entities.

Federalism Implications

The proposed rulemaking action would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, the FAA has determined that this notice does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

Conclusion

In this action the FAA proposes to amend the requirements imposed upon aviation employers for the maintenance and submission of specific anti-drug program information. It is undertaken in response to a DOT NPRM that would establish a standard Management Information System (MIS) for the Department's drug-testing programs. This MIS will provide the basis for monitoring anti-drug rule implementation and compliance, and for evaluating the effectiveness of the FAA's and DOT's anti-drug programs. Pursuant to the terms of the Regulatory Flexibility Act of 1980, the FAA certifies that the provisions contained in this proposal would not have a

significant economic impact, positive or negative, on a substantial number of small entities. In addition, the proposal would not result in an annual effect on the economy of $100 million or more and would not result in a significant increase in consumer prices; thus, the proposal is not a major one pursuant to the criteria of Executive Order 12291. However, because the proposal involves issues of substantial interest to the public, the FAA has determined that the proposal is significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034; February 2, 1979).

List of Subjects

14 CFR Part 121

Air carriers, Air transportation, Aircraft, Aircraft pilots, Airmen, Airplanes, Aviation safety, Drug abuse, Drugs, Narcotics, Pilots, Safety, Transportation.

In consideration of the foregoing, the Federal Aviation Administration proposes to amend title 14, Code of Federal Regulations, part 121, appendix I, as follows:

PART 121—CERTIFICATION AND OPERATIONS: DOMESTIC, FLAG, AND SUPPLEMENTAL AIR CARRIERS AND COMMERCIAL OPERATORS OF LARGE AIRCRAFT

1. The authority citation for part 121 continues to read as follows:

Authority: 49 U.S.C. App. 1354(a), 1355, 1356, 1357, 1401, 1421–1430, 1472, 1485, and 1502; 49 U.S.C. 106(g) (revised, Pub. L. 97–449, January 12, 1983).

2. Section X of appendix I to part 121 is revised to read as follows:

Appendix I to Part 121—Drug Testing Program

* * * * *

X. Reporting of anti-drug program results.

A. Each employer shall maintain records of the anti-drug program information identified in this section.

B. Each employer or consortium shall submit annual reports of anti-drug program results on the FAA standard form to the FAA by February 15 for the prior calendar year January 1 through December 31.

C. An FAA-approved consortium may submit reports on behalf of individual aviation employers for purposes of compliance with this reporting requirement. However, the aviation employer shall remain responsible for ensuring the accuracy and timeliness of each report submitted on its behalf by a consortium.

D. Each report shall be submitted on the form specified by the FAA. No other DOT Operating Administration form, or the DOT form, is acceptable for submission to the FAA.

E. Each report shall be signed by the employer's or consortium's anti-drug program manager or designated representative.

F. Each report shall include each of the following informational elements:

1. Number of covered employees by employee category.

2. Number of covered employees affected by the anti-drug rule of another OA identified and reported by number and employee category.

3. Number of specimens collected by type of test and employee category.

4. Number of positive test results verified by a Medical Review Officer (MRO) by type of test, type of drug, and employee category.

5. Number of negative tests verified by a MRO by type of test and employee category.

6. Number of persons denied a position as a covered employee based on a verified positive drug test verified by a MRO.

7. Number of employees with a test verified positive by a MRO who were returned to duty in covered positions (currently in or having completed rehabilitation or otherwise qualified to return to duty during the reporting period).

8. Number of employees with tests verified positive for multiple drugs by a MRO.

9. Number of covered employees who refused to submit to a drug test and the action taken in response to the refusal(s).

10. Number of covered employees and supervisory personnel who have received required initial training. Number of supervisors who have received required recurrent or refresher training.

3. Appendix K to part 121 is added to read as follows:

Note: This appendix will not appear in the Code of Federal Regulations.

Appendix K to Part 121—Drug and Alcohol Testing Management Information System Data Collection Form

BILLING CODE 4910–13–M

GENERAL INSTRUCTIONS

This reporting form includes three parts. Collectively, these parts address the data elements required in the Federal Aviation Administration (FAA) and the U.S. Department of Transportation (DOT) drug and alcohol testing regulations. Each part of the form is preceded by instructions which outline and explain the information requested and indicate the probable sources for this information. The three parts of the form are:

Section	Instructions Pages	Reporting Form Pages
I. ORGANIZATIONAL INFORMATION	i-ii	1-2
II. DRUG TESTING INFORMATION	iii-vii	3-11
III. ALCOHOL TESTING INFORMATION	viii-xii	12-19

I. ORGANIZATIONAL INFORMATION

INSTRUCTIONS

This part of the reporting form includes two sections. These sections, the page number for the instructions, and the page location on the reporting form are:

Section	Instructions Page	Reporting Form Page
A. EMPLOYER INFORMATION	i	1
B. COVERED EMPLOYEES	ii	2

Page 1 **EMPLOYER INFORMATION** (Section A) requires the company name for which the report is done and a current address. Below the company names, list any other names the company uses ("Doing Business As") and the company's FAA Anti-drug Plan Identification Number. Indicate which FAA Certificate(s) are held by the company. Below this, a signature and date are required certifying the correctness and completeness of this form, and a current telephone number (including the area code). Finally, list the name, address, and telephone number for any other aviation companies covered under the report, attaching additional sheets, if necessary.

Page 2

COVERED EMPLOYEES (Section B) requires a count for each employee category that must be tested under FAA/DOT regulations. For the FAA, the covered employees are "Flight Crew Members" which includes pilots, flight engineers, and navigators; "Flight Attendants", "Flight or Ground Instructors"; "Aircraft Dispatchers"; "Flight Testing Personnel"; "Maintenance or Preventive Maintenance Personnel"; "Security or Screener Personnel"; and "Air Traffic Control Personnel." The most likely source for this information is the employer's personnel department. These counts should be based on the company records for the reported year. The **TOTAL** is a count of **all** covered employees for **all** categories combined, i.e., the sum of the columns.

Additional information must be completed if your company employs personnel who perform duties covered by the drug and alcohol rules of more than one DOT operating administration. **NUMBER OF EMPLOYEES COVERED BY MORE THAN ONE DOT OPERATING ADMINISTRATION**, requires that you identify the number of employees in each employee category under the appropriate additional operating administration(s).

For Office Use Only

FAA DRUG AND ALCOHOL TESTING MIS DATA COLLECTION FORM

YEAR COVERED BY THIS REPORT: 19___

A. AVIATION EMPLOYER INFORMATION

Company _____

Address _____

_____

Other Names the Company Uses ("Doing Business As")

_____

_____

FAA Anti-drug Plan Identification Number: _____

FAA Certificate(s) held (check all that apply):

☐ 121 ☐ 145 ☐ 135 ☐ Other (specify)

I, the undersigned, certify the attached Federal Aviation Administration Annual Anti-Drug Program Report, is to the best of my knowledge and belief, a true, correct, and complete form for the period stated.

_____
Signature

_____
Title

_____
Date of Signature

_____
Phone Number

Title 18, U.S.C. Section 1001, makes it a criminal offense subject to a maximum fine of $10,000, or imprisonment for not more than 5 years, or both, to knowingly and willfully make or cause to be made any false or fraudulent statements or representations in any matter within the jurisdiction of any agency of the United States.

Other aviation employers reported on this form (e.g., subsidiary companies, contractors, etc.). Attach additional sheets if necessary.

Company _____

Address _____

Phone_____ FAA Certificate (as applicable)_____

Company _____

Address _____

Phone_____ FAA Certificate (as applicable)_____

B. COVERED EMPLOYEES

COVERED EMPLOYEES						
EMPLOYEE CATEGORY	NUMBER OF COVERED EMPLOYEES	NUMBER OF EMPLOYEES COVERED BY MORE THAN ONE DOT OPERATING ADMINISTRATION				
		FHWA	FRA	FTA	RSPA	USCG
Flight Crew Members						
Flight Attendants						
Flight or Ground Instructors						
Aircraft Dispatchers						
Flight Testing Personnel						
Maintenance or Preventive Maintenance Personnel						
Security or Screener Personnel						
Air Traffic Control Personnel						
TOTAL						

Mail the completed form to: Drug Abatement Division (AAM-800)
Federal Aviation Administration
U.S. Department of Transportation
400 7th Street, S.W., Room 2336
Washington, D.C. 20590

II. DRUG TESTING INFORMATION

INSTRUCTIONS

The following instructions are to be used as a guide for completing the drug testing information in the FAA and DOT **Drug and Alcohol Testing Management Information System Data Collection Form**. These instructions outline and explain the information requested and indicate probable sources for this information. A sample testing results table with a narrative explanation is provided on pages v-vi as an example to facilitate the process of completing the form correctly.

This part of the reporting form includes four sections. These sections address the data elements required in the regulations. These sections, the page number for the instructions, and the page location on the reporting form are:

Section	Instructions Page	Reporting Form Page
A. JOB APPLICANT TESTING INFORMATION	iv	4
B. EMPLOYEE TESTING	vi	5-9
C. OTHER TESTING/PROGRAM INFORMATION	vii	10
D. TRAINING/EDUCATION	vii	11

Sections A and B are used to summarize the drug testing results for covered employees. There are six tables to be completed (one in Section A and five in Section B). The first table (Section A) is where you enter the data on pre-employment testing. The five tables in Section B are for entering drug testing data on periodic, random, post-accident, reasonable cause, and return to duty testing, respectively. Items necessary to complete these tables include:

1) the number of specimens collected in each employee category;
2) the number of specimens tested which were verified negative and verified positive for any drug(s); and
3) individual counts of those specimens which were verified positive for each of the five drugs.

Do not include results of quality control (QC) samples submitted to the testing laboratory in any of the tables.

A sample table with detailed instructions is provided for Section A, **JOB APPLICANT TESTING INFORMATION**. The format and explanations used for the sample table apply to all six of the tables in Sections A and B.

Information on actions taken with those persons testing positive is required at the end of both Sections A and B. Specific instructions for providing this latter information are given after the instructions for completing the tables in Sections A and B.

Page 4

JOB APPLICANT TESTING INFORMATION (Section A) requires information for pre-employment testing. All numbers entered into this table should be separated into the category of employment for which the applicant was applying. A sample table with example numbers is presented on page vi.

Three types of information are necessary to complete the left side of this table. The first blank column with the heading "**NUMBER OF SPECIMENS COLLECTED,**" requires a count for all collected specimens by employee category. It should not include refusals to test. The second blank column with the heading "**NUMBER OF SPECIMENS VERIFIED NEGATIVE,**" requires a count for all completed tests by employee category that were verified negative by your Medical Review Officer (MRO).

The third blank column with the heading "**NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS,**" refers to the number of specimens provided by job applicants that were verified positive. "Verified positive" means the results were verified by your MRO.

The right hand portion of this table, with the heading "**NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG,**" requires counts of positive tests for each of the five drugs for which tests were done, i.e., marijuana (THC), cocaine, phencyclidine (PCP), opiates, and amphetamines. The number of specimens positive for each drug should be entered in the appropriate column for that drug type. Again, "verified positive" refers to test results verified by your MRO.

If an applicant tested positive for more than one drug; for example, both marijuana and cocaine, that person's positive results would be included once in each of the appropriate columns (marijuana and cocaine).

Each column in the table should be added and the answer entered in the row marked "**TOTAL**".

A sample table is provided on page vi with example numbers.

Page 4

Below the table for pre-employment testing information is a box with the heading "**Number of persons denied a position as a covered employee following a verified positive drug test**". This is simply a count of those persons who were not placed in a covered position because they tested positive for one or more drugs.

SAMPLE APPLICANT TEST RESULTS TABLE

The following example is for Section A, **JOB APPLICANT TESTING INFORMATION**, which summarizes pre-employment testing results. The procedures detailed here also apply to the tables in Section B which require you to summarize testing results for employees. This example will use the first two FAA categories "Flight Crew Members" and "Flight Attendants" to illustrate the procedures for completing the form.

A — Urine specimens were collected for 157 job applicants for flight crew positions during the reporting year. This information is entered in the first blank column of the table in the row marked "Flight Crew Members".

B — The Medical Review Officer (MRO) for your company reported that 153 of those 157 specimens from applicants for flight crew positions were negative (i.e., no drugs were detected). Enter this information in the second blank column of the table in the row marked "Flight Crew Members".

C — The MRO for your company reported that 4 of those 157 specimens from applicants for flight crew positions were positive (i.e., a drug or drugs were detected). Enter this information in the third blank column of the table in the row marked "Flight Crew Members".

D — With the 4 specimens that tested positive, the following drugs were detected:

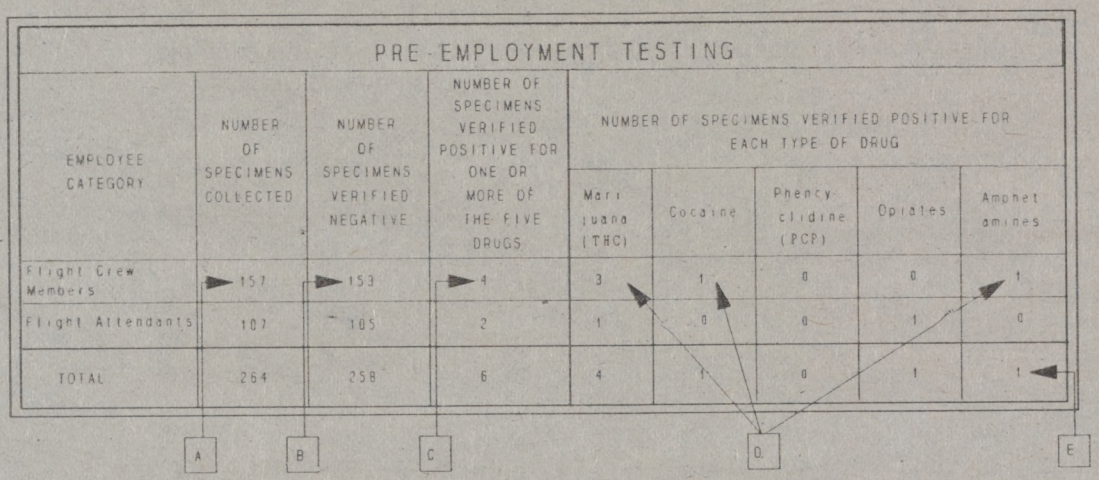
Specimen	Drugs
#1	Marijuana
#2	Amphetamines
#3	Marijuana and Cocaine (Multi-drug specimen)
#4	Marijuana

Marijuana was detected in three (3) specimens, cocaine in one (1), and amphetamines in one (1). This information is entered in the columns on the right hand side of the table under each of these drugs. Since two different drugs were detected in specimen #3 (multi-drug), entries are made in both the marijuana and the cocaine columns for this specimen. Information on multi-drug specimens must also be entered in Section C, **OTHER TESTING/PROGRAM INFORMATION**, on page 10 of the reporting form.

Please note that the sample data collection form below also has information for flight attendant positions on line two of our data collection form. The same procedures outlined for flight crew positions should be followed for entering the data on flight attendant positions. With applicants for flight attendant positions, 107 specimens were collected resulting in 105 verified negatives and 2 verified positives -- 1 for marijuana and 1 for opiates. This information is entered in the row marked "Flight Attendants".

E — The last row, marked "TOTAL", requires you to add the numbers in each of the columns. With this example, 157 specimens from applicants for flight crew positions were collected and 107 for applicants for flight attendant positions. The total for that column would be 264 (i.e., 157+107). The same procedure should

be used for each column, i.e., add all the numbers in that column and place the answer in the last row.



PRE-EMPLOYMENT TESTING

EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Flight Crew Members	157	153	4	3	1	0	0	1
Flight Attendants	107	105	2	1	0	0	1	0
TOTAL	264	258	6	4	1	0	1	1

A B C D E

Note that adding up the numbers for each type of drug in a row ("NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG") will not always match the number entered in the third column, "NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS". The total for the numbers on the right hand side of the table may differ from the number of specimens testing positive since some specimens may contain more than one drug.

Remember that the same procedures indicated above are to be used for completing all of the tables in Sections A and B.

Pages 5-9 **EMPLOYEE TESTING** (Section B), as indicated, requires information for company employees in **covered positions** only. A separate table must be completed for each category of test. These categories include: (1) periodic, (2) random, (3) post-accident, (4) reasonable cause, and (5) return to duty testing. These tables are to be filled out like the sample table above. Again, these numbers **do not** include refusals for testing.

Page 9 Following these tables that summarize **EMPLOYEE TESTING**, you must provide counts for employees who have tested positive and are currently in, or have completed rehabilitation, and have returned to work in a covered position. Report this information only for employees who tested positive during this reporting period. This information should be available from the personnel office and/or drug program manager.

Page 10 **OTHER TESTING/PROGRAM INFORMATION** (Section C) requires that you complete a table dealing with specimens positive for more than one drug and a table dealing with employees who refused to submit to a drug test.

Page 10 **SPECIMENS VERIFIED POSITIVE FOR MORE THAN ONE DRUG** requires information on specimens that contained more than one drug. Indicate the **EMPLOYEE CATEGORY** and the **NUMBER OF VERIFIED POSITIVES**, then check the appropriate columns indicating the combination of drugs reported as positive. For example, if marijuana and cocaine were detected in 3 flight crew members specimens, then you would write "Flight Crew Members" as the employee category, "3" as the number of verified positives, and "3" in the columns for "Marijuana" and "Cocaine". If marijuana and opiates were detected in 2 flight crew members specimens, then you would write "Flight Crew Members" as the employee category, "2" as the number of verified positives, and "2" in the columns for "Marijuana" and "Opiates".

Page 10 **EMPLOYEES WHO REFUSED TO SUBMIT TO A DRUG TEST** requires information on the **NUMBER OF COVERED EMPLOYEES** who refused to submit to a drug test required under this regulation, and a description of the **ACTION TAKEN** in response to the refusal. An example of an action taken would be "removed from covered duties pending termination".

Page 11 **TRAINING/EDUCATION** (Section D) requires information on the number of covered employees and supervisory personnel who have received the required drug training during the current reporting period.

READ BEFORE COMPLETING THE REMAINDER OF THIS FORM:

1 All items refer to the **current** reporting period **only** (for example, January 1, 1993 - December 31, 1993).

2. This report is only for testing **REQUIRED BY THE FEDERAL AVIATION ADMINISTRATION (FAA) AND THE U.S. DEPARTMENT OF TRANSPORTATION (DOT)**:

- Results should be reported only for employees in **COVERED POSITIONS** as defined by FAA/DOT drug testing regulations.

- The information requested should only include testing for marijuana (THC), cocaine, phencyclidine (PCP), opiates, and amphetamines using the standard procedures required by DOT regulation 49 CFR Part 40.

3. Information on refusals for testing should only be reported in Section C ("OTHER TESTING/PROGRAM INFORMATION"). Do not include refusals for testing in other sections of this report.

4. Do not include the results of any quality control (QC) samples submitted to the testing laboratory in any of the tables.

5. Complete all items; DO NOT LEAVE ANY ITEM BLANK. If the value for an item is zero (0), place a zero (0) on the form.

This part of the form requires information on VERIFIED POSITIVE and VERIFIED NEGATIVE drug tests. These are the results that are reported to you by your Medical Review Officer (MRO).

A. JOB APPLICANT TESTING INFORMATION

PRE-EMPLOYMENT TESTING								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Flight Crew Members								
Flight Attendants								
Flight or Ground Instructors								
Aircraft Dispatchers								
Flight Testing Personnel								
Maintenance or Preventive Maintenance Personnel								
Security or Screener Personnel								
Air Traffic Control Personnel								
TOTAL								

Number of persons denied a position as a covered employee following a verified positive drug test: [ ]

B. EMPLOYEE TESTING

PERIODIC TESTING								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Flight Crew Members								
Flight Attendants								
Flight or Ground Instructors								
Aircraft Dispatchers								
Flight Testing Personnel								
Maintenance or Preventive Maintenance Personnel								
Security or Screener Personnel								
Air Traffic Control Personnel								
TOTAL								

B. EMPLOYEE TESTING (continued)

RANDOM TESTING								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Flight Crew Members								
Flight Attendants								
Flight or Ground Instructors								
Aircraft Dispatchers								
Flight Testing Personnel								
Maintenance or Preventive Maintenance Personnel								
Security or Screener Personnel								
Air Traffic Control Personnel								
TOTAL								

B. EMPLOYEE TESTING (continued)

POST-ACCIDENT TESTING								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Flight Crew Members								
Flight Attendants								
Flight or Ground Instructors								
Aircraft Dispatchers								
Flight Testing Personnel								
Maintenance or Preventive Maintenance Personnel								
Security or Screener Personnel								
Air Traffic Control Personnel								
TOTAL								

B. EMPLOYEE TESTING (continued)

REASONABLE CAUSE TESTING								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Flight Crew Members								
Flight Attendants								
Flight or Ground Instructors								
Aircraft Dispatchers								
Flight Testing Personnel								
Maintenance or Preventive Maintenance Personnel								
Security or Screener Personnel								
Air Traffic Control Personnel								
TOTAL								

B. EMPLOYEE TESTING (continued)

RETURN TO DUTY TESTING								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Flight Crew Members								
Flight Attendants								
Flight or Ground Instructors								
Aircraft Dispatchers								
Flight Testing Personnel								
Maintenance or Preventive Maintenance Personnel								
Security or Screener Personnel								
Air Traffic Control Personnel								
TOTAL								

Number of employees, currently in or having completed rehabilitation or otherwise qualified to return to duty, who have returned to work in a covered position during this reporting period: [ ]

C. OTHER TESTING/PROGRAM INFORMATION

SPECIMENS VERIFIED POSITIVE FOR MORE THAN ONE DRUG						
EMPLOYEE CATEGORY	NUMBER OF VERIFIED POSITIVES	Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines

EMPLOYEES WHO REFUSED TO SUBMIT TO A DRUG TEST	
NUMBER OF COVERED EMPLOYEES	ACTION TAKEN

D. TRAINING/EDUCATION

Training During Current Reporting Period

Number of covered employees who have received initial training on the consequences, manifestations, and behavioral cues of drug use as required by FAA drug testing regulations: [ ]

Number of supervisory personnel who have received initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable drug use as required by FAA drug testing regulations: [ ]

Number of supervisory personnel who have received recurrent or refresher training on the specific contemporaneous physical, behavioral, and performance indicators of probable drug use [ ]

III. ALCOHOL TESTING INFORMATION

INSTRUCTIONS

The following instructions are to be used as a guide for completing the alcohol testing information for the Federal Aviation Administration (FAA) and the U.S. Department of Transportation (DOT) **Drug and Alcohol Testing Management Information System Data Collection Form**. These instructions outline and explain the information requested and indicate probable sources for this information. A sample testing results table with a narrative explanation is provided on pages ix-xi as an example to facilitate the process of completing the form correctly.

This part of the reporting form includes four sections. These sections address the data elements required in the regulations. These sections, the page number for the instructions, and the page location on the reporting form are:

Section	Instructions Page	Reporting Form Page
A. JOB APPLICANT TESTING INFORMATION	ix	13
B. EMPLOYEE TESTING	xi	14-18
C. OTHER TESTING/PROGRAM INFORMATION	xi	19
D. TRAINING/EDUCATION	xii	19

Sections A and B are used to summarize the alcohol testing results for covered employees. There are six tables to be completed (one in Section A and five in Section B). The first table (Section A) is where you enter the data on pre-employment/pre-duty testing. The five tables in Section B are for entering alcohol testing data for random, post-accident, reasonable suspicion, return to duty, and follow-up testing, respectively. Items necessary to complete these tables include:

1) the number of initial alcohol tests performed for each employee category;
2) the number of confirmatory alcohol tests performed for each employee category;
3) the number of confirmatory test results which were equal to or greater than 0.04; and
4) the number of confirmatory test results which were equal to or greater than 0.02, but less than 0.04.

A sample table with detailed instructions is provided for Section A, **JOB APPLICANT TESTING INFORMATION**. The format and explanations used for the sample table apply to all six of the tables in Sections A and B.

Information on actions taken with those persons whose alcohol test results were 0.04 or greater is required at the end of both Sections A and B. Specific instructions for providing this latter information are given after the instructions for completing the tables in Sections A and B.

Page 13 **JOB APPLICANT TESTING INFORMATION** (Section A) requires information for pre-employment/pre-duty testing. All numbers entered into this table should be separated into the category of employment for which the applicant was applying. A sample table with example numbers is presented on page x.

Four types of information are necessary to complete the left side of this table. The first blank column with the heading "**NUMBER OF INITIAL TESTS**" requires a count of all initial alcohol tests performed for each employee category. It should not include refusals to test. The second blank column with the heading "**NUMBER OF CONFIRMATORY TESTS**" requires a count of all confirmatory alcohol tests performed for each employee category.

The third blank column with the heading "**NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04**" requires a count for each employee category.

The fourth blank column with the heading "**NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04**" requires a count for each employee category.

Each column in the table should be added and the answer entered in the row marked "**TOTAL**".

A sample table is provided on page x with example numbers.

Page 13 Below the table for pre-employment testing information is a box with the heading "**Number of persons denied a position as a covered employee following a pre-employment/pre-duty alcohol test indicating an alcohol concentration of 0.04 or greater**". Enter the appropriate number in the box provided.

SAMPLE APPLICANT TEST RESULTS TABLE

The following example is for Section A, **JOB APPLICANT TESTING INFORMATION**, which summarizes pre-employment/pre-duty testing results. The procedures detailed here also apply to the tables in Section B which require you to summarize testing results for employees. This example will use the categories "Flight Crew Members" and "Flight Attendants" to illustrate the procedures for completing the form.

A Initial tests were performed on 157 job applicants for flight crew positions during the reporting year. This information is entered in the first blank column of the table in the row marked "Flight Crew Members".

B Confirmatory tests were necessary for 6 of the 157 applicants for flight crew positions. Enter this information in the second blank column of the table in the

row marked "Flight Crew Members". The confirmatory test results for these 6 applicants were the following:

Applicant	Confirmation Result
#1	0.06
#2	0.01
#3	0.11
#4	0.04
#5	0.03
#6	0.02

C The confirmatory test results for 3 of the applicants for flight crew positions were equal to or greater than 0.04. Enter this information in the third blank column of the table in the row marked "Flight Crew Members".

D The confirmatory test results for 2 of the applicants for flight crew positions were equal to or greater than 0.02, but less than 0.04. Enter this information in the fourth blank column of the table in the row marked "Flight Crew Members".

E The last row, marked "TOTAL", requires you to add the numbers in each of the columns. With this example, 157 applicants for flight crew positions and 107 applicants for flight attendant positions were subjected to initial tests. The total for that column would be 264 (i.e., 157 + 107). The same procedure should be used for each column (i.e., add all the numbers in that column and place the answer in the last row).

PRE-EMPLOYMENT/PRE-DUTY TESTING

EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Flight Crew Members	157	6	3	2
Flight Attendants	107	3	1	0
TOTAL	264	9	4	2

A B C D E

Please note that the sample data collection form also has information for flight attendants workers on line two. The same procedures outlined for flight crew members should be followed

for entering the data on flight attendant workers. With applicants for flight attendant positions, 107 initial tests were conducted resulting in 3 confirmatory tests. The confirmatory test result for 1 of the flight attendant applicants was equal to or greater than 0.04; no results were equal to or greater than 0.02, but less than 0.04. This information is entered in the row marked "Flight Attendants".

Note that adding up the numbers for confirmation results in columns three and four will not always match the number entered in the second column, "NUMBER OF CONFIRMATORY TESTS". These numbers may differ since some confirmatory test results may be less than 0.02.

Remember that the same procedures indicated above are to be used for completing all of the tables in Sections A and B.

Pages 14-18 **EMPLOYEE TESTING** (Section B), as indicated, requires information for company employees in **covered positions** only. A separate table must be completed for each category of test. These categories include: (1) random, (2) post-accident, (3) reasonable suspicion, (4) return to duty, and (5) follow-up testing. These tables are to be filled out like the sample table above. Again, these numbers **do not** include refusals for testing.

Page 18 Following these tables that summarize **EMPLOYEE TESTING**, you must provide a count of the **"Number of employees with a confirmatory alcohol test indicating an alcohol concentration of 0.04 or greater who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in FAA/DOT regulations)"**. Report this information only for employees who were tested during this reporting period. This information should be available from the personnel office and/or alcohol program manager.

Page 19 **OTHER TESTING/PROGRAM INFORMATION** (Section C) requires that you provide information on employees who tested positive for drugs and alcohol (at the same time), information on violations of other alcohol provisions (not necessarily resulting in positive alcohol tests), and information on employees who refused to submit to an alcohol test.

Page 19 **Number of employees administered drug and alcohol tests at the same time resulting in a verified positive drug test and an alcohol test indicating an alcohol concentration of 0.04 or greater**, requires that a count of all such employees be entered in the indicated box.

Page 19 **VIOLATIONS OF OTHER ALCOHOL PROVISIONS/PROHIBITIONS OF THIS REGULATION**, requires information on the **NUMBER OF COVERED EMPLOYEES** committing such a violation, a description of the **VIOLATION** committed (e.g., pre-duty alcohol use, on duty alcohol use, on duty alcohol possession), and a description of the **ACTION TAKEN** in response to the violation.

Page 19 **EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST** requires information on the **NUMBER OF COVERED EMPLOYEES** who refused to submit to an alcohol test as required under this regulation, and a description of the **ACTION TAKEN** in response to the refusal.

Page 19 **TRAINING/EDUCATION** (Section D) requires information on the number of supervisory personnel who have received the required alcohol training during the current reporting period.

READ BEFORE COMPLETING THE REMAINDER OF THIS FORM:

1. All items refer to the **current** reporting period **only** (for example, January 1, 1993 - December 31, 1993).

2. This report is only for testing **REQUIRED BY THE FEDERAL AVIATION ADMINISTRATION (FAA) AND THE U.S. DEPARTMENT OF TRANSPORTATION (DOT)**:

   - Results should be reported only for employees in **COVERED POSITIONS** as defined by FAA/DOT alcohol testing regulations.

   - The information requested should only include testing for alcohol using the standard procedures required by DOT regulation 49 CFR Part 40.

3. Information on refusals for testing should only be reported in Section C ("OTHER TESTING/PROGRAM INFORMATION"). Do not include refusals for testing in other sections of this part of the report.

4. Complete all items; DO NOT LEAVE ANY ITEM BLANK. If the value for an item is zero (0), place a zero (0) on the form.

A. JOB APPLICANT TESTING INFORMATION

PRE-EMPLOYMENT/PRE-DUTY TESTING				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Flight Crew Members				
Flight Attendants				
Flight or Ground Instructors				
Aircraft Dispatchers				
Flight Testing Personnel				
Maintenance or Preventive Maintenance Personnel				
Security or Screener Personnel				
Air Traffic Control Personnel				
TOTAL				

Number of persons denied a position as a covered employee following a pre-employment/pre-duty alcohol test indicating an alcohol concentration of 0.04 or greater: [ ]

B. EMPLOYEE TESTING

RANDOM TESTING				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Flight Crew Members				
Flight Attendants				
Flight or Ground Instructors				
Aircraft Dispatchers				
Flight Testing Personnel				
Maintenance or Preventive Maintenance Personnel				
Security or Screener Personnel				
Air Traffic Control Personnel				
TOTAL				

B. EMPLOYEE TESTING (continued)

POST-ACCIDENT TESTING				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Flight Crew Members				
Flight Attendants				
Flight or Ground Instructors				
Aircraft Dispatchers				
Flight Testing Personnel				
Maintenance or Preventive Maintenance Personnel				
Security or Screener Personnel				
Air Traffic Control Personnel				
TOTAL				

B. EMPLOYEE TESTING (continued)

REASONABLE SUSPICION TESTING				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Flight Crew Members				
Flight Attendants				
Flight or Ground Instructors				
Aircraft Dispatchers				
Flight Testing Personnel				
Maintenance or Preventive Maintenance Personnel				
Security or Screener Personnel				
Air Traffic Control Personnel				
TOTAL				

B. EMPLOYEE TESTING (continued)

RETURN TO DUTY TESTING				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Flight Crew Members				
Flight Attendants				
Flight or Ground Instructors				
Aircraft Dispatchers				
Flight Testing Personnel				
Maintenance or Preventive Maintenance Personnel				
Security or Screener Personnel				
Air Traffic Control Personnel				
TOTAL				

Number of employees with a confirmatory alcohol test indicating an alcohol concentration of 0.04 or greater who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in FAA regulations): [ ]

B. EMPLOYEE TESTING (continued)

FOLLOW-UP TESTING				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Flight Crew Members				
Flight Attendants				
Flight or Ground Instructors				
Aircraft Dispatchers				
Flight Testing Personnel				
Maintenance or Preventive Maintenance Personnel				
Security or Screener Personnel				
Air Traffic Control Personnel				
TOTAL				

C. OTHER TESTING/ PROGRAM INFORMATION

Number of employees administered drug and alcohol tests at the same time resulting in a verified positive drug test and an alcohol test indicating an alcohol concentration of 0.04 or greater: ☐

VIOLATIONS OF OTHER ALCOHOL PROVISIONS/PROHIBITIONS OF THIS REGULATION		
NUMBER OF COVERED EMPLOYEES	VIOLATION	ACTION TAKEN

EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST	
NUMBER OF COVERED EMPLOYEES	ACTION TAKEN

D. TRAINING/EDUCATION

Training During Current Reporting Period

Number of supervisors who have received the required training in determining the existence of reasonable suspicion of alcohol misuse: ☐

BILLING CODE 4910-13-C

Issued in Washington, DC, on December 2, 1992.

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Secretary of Transportation.

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Administrator.

[FR Doc. 92–29677 Filed 12–10–92; 10:00 am]

BILLING CODE 4910–13–M

federal register

Tuesday
December 15, 1992

Part IV

Department of Transportation

Federal Highway Administration

49 CFR Part 350, et al.
Drug and Alcohol Testing Programs; Proposed Rules

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

49 CFR Parts 350, 382, 383, 392, and 395

[FHWA Docket No. MC–92–19]

RIN 2125–AC85

Federal Motor Carrier Safety Regulations; Commercial Motor Carrier Safety Assistance Program; Controlled Substances and Alcohol Use and Testing; Commercial Driver's License Standards; Driving of Motor Vehicles; Hours of Service of Drivers

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FHWA is requesting comments on a proposed rule which would prohibit alcohol use and possession and mandate alcohol testing of drivers who operate commercial motor vehicles. This action is being taken in response to the Omnibus Transportation Employee Testing Act of 1991 and complements existing regulatory prohibitions on alcohol and controlled substances use. This proposal is consistent with a companion NPRM published by the FHWA on controlled substances testing and an NPRM on alcohol testing procedures published by the Office of the Secretary, U. S. Department of Transportation (OST). These two NPRMs are published elsewhere in today's **Federal Register**.

The overall goal of alcohol testing is to ensure that drivers who use alcohol are not permitted to operate a commercial motor vehicle, thereby reducing accidents, injuries and fatalities on highways nationwide.

In this proposal, the FHWA is proposing two different options for testing drivers randomly for alcohol misuse as required by the Omnibus Transportation Employee Testing Act of 1991. The first option would require motor carriers to perform all aspects of an alcohol testing program. The second option would require States accepting Motor Carrier Safety Assistance Program (MCSAP) grants from the FHWA to perform random alcohol testing of commercial motor vehicle drivers, while motor carriers would be required to perform all other aspects of the alcohol testing program. The FHWA will determine from the comments received to the docket whether the second option is feasible for alcohol testing of drivers of commercial motor vehicles.

DATES: Comments must be received on or before April 14, 1993.

ADDRESSES: All signed, written comments should refer to the docket number that appears at the top of this document and must be submitted to HCC–10, room 4232, Office of the Chief Counsel, 400 Seventh Street, SW., Washington, DC 20590. All comments received will be available for examination at the above address from 8:30 a.m. to 3:30 p.m., e.t., Monday through Friday, except Federal legal holidays.

FOR FURTHER INFORMATION CONTACT: Mr. David Miller, Office of Motor Carrier Standards, (202) 366–2981, or Mr. David Sett, Office of the Chief Counsel, (202) 366–0834, Federal Highway Administration, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal legal holidays.

The public is urged to obtain information through the Department of Transportation's Anti-Drug Information Center (ADIC) system. The public may access the system by dialing (800) 225–3784 using a touch tone telephone. Access to a computer system may also be made using a personal computer connected via modem on (800) 225–3804. A user fee will be charged for certain services provided by the system.

SUPPLEMENTARY INFORMATION:

I. Statutory Authority

The Omnibus Transportation Employee Testing Act of 1991 (the Act) was signed by President Bush on October 28, 1991, as part of the 1992 Department of Transportation and Related Agencies Appropriations Act. Public Law 102–143, Title V, 105 Stat. 917, 952 (1991). The Act requires the Secretary of Transportation to promulgate regulations for alcohol and controlled substances testing for persons in safety-sensitive positions in four modes of transportation: Motor carrier, airline, railroads and mass transit. The general requirements of the Act are addressed in the OST's NPRM amending 49 CFR part 40 and in a common preamble, also prepared by OST, applicable to all of the U.S. Department of Transportation (USDOT) modal agency rules on alcohol testing programs. These documents appear elsewhere in today's issue of the Federal Register. All of the requirements of the Act are fully incorporated herein.

Section 5 of the Act addresses the requirements for motor carriers. This section amends the Commercial Motor Vehicle Safety Act of 1986 (CMVSA). Public Law 99–570, 100 Stat. 3207–170 (codified at 49 U.S.C. app. 2701–2718) The CMVSA establishes the requirements for the commercial driver's license (CDL). The FHWA has implemented the CDL provisions of the CMVSA through the publication of several final rules. A discussion of the CDL requirements, including who is required to obtain a CDL, is included under Section V, Commercial driver's license program, later in this preamble.

The Act requires the Secretary to issue regulations by October 28, 1992, requiring motor carriers to conduct pre-employment, reasonable suspicion, random and post-accident testing of drivers for the use of alcohol or a controlled substance which use constitutes a violation of law or Federal regulation. Congress recognized that the Federal Highway Administration has already issued regulations for controlled substances testing which reference the scientific and technical guidelines established by the Department of Health and Human Services. (49 CFR part 391, subpart H). The FHWA believes it is the intent of Congress that the regulations required to be developed under the Act be an adjunct to FHWA's current controlled substances regulations. In addition, the FHWA believes that the sanctions addressed in the Act, for violations of law or Federal regulation for use of a controlled substance or alcohol for which a driver is not considered to be under the influence, should be the same or similar to the sanctions or penalties of Public Law 99-570, 100 Stat. 3207–170 Sec. 12008 of the CMVSA.

II. Regulatory History

The FHWA published in the **Federal Register** a final rule on November 21, 1988, setting forth regulations to require motor carriers who operate commercial motor vehicles in interstate commerce to have an anti-drug program, including the testing of commercial motor vehicle drivers for the use of controlled substances. 53 FR 47134. That rule required motor carriers to conduct five types of controlled substances tests: Pre-employment/use, periodic, reasonable cause, post-accident and random. Generally, interstate drivers of commercial motor vehicles with a gross vehicle weight rating (GVWR) more than 26,000 pounds, vehicles transporting hazardous materials which are required to be placarded, or vehicles designed to transport more than 15 passengers, including the driver, are covered by this final rule.

On the same date, November 21, 1988, the Office of the Secretary, U.S. Department of Transportation (OST) published an interim final rule, "Procedures for Transportation

Workplace Drug Testing Programs." 53 FR 47002. On November 2, 1989, OST published an advance notice of proposed rulemaking (ANPRM) on alcohol testing. 54 FR 46326. On December 1, 1989, OST published a final rule amending certain portions of the interim final rule. 54 FR 49854. This final rule is being referred to in this document as the "OST rule."

Subsequent to the publication of the November 21, 1988, FHWA final rule, the FHWA published several notices relating to the controlled substances testing requirements, including an interim final rule. 54 FR 39546; 54 FR 46616; 54 FR 53294; 55 FR 3546.

III. Substance Abuse in Transportation

Refer to the Office of the Secretary's common preamble to all the USDOT modal agencies' alcohol NPRMs, published elsewhere in today's **Federal Register** for a complete discussion of this topic. The OST preamble is referred to as the common preamble in this document since it applies to all DOT agency alcohol testing programs including FHWA's, except as noted herein.

IV. Legal Issues

Many of the legal issues implicated by the FHWA's proposed testing program have been considered in the Legal Authority/Issues section of the OST general preamble. Therefore, only those issues unique to or highlighted by FHWA's rule and regulatory environment will be discussed in this section.

In *International Brotherhood of Teamsters* v. *U.S. Department of Transportation*, 932 F.2d 1292 (9th Cir. 1991) ("IBT"), the FHWA's current controlled substances testing program was adjudged to comport with the Fourth Amendment. The court held that the search mandated by the FHWA, including random, nonsuspicion testing, was reasonable. Warrant and probable cause requirements were held impractical in the particular context of motor carrier-based testing of drivers of commercial motor vehicles. The testing program "promotes special governmental needs, beyond the normal need for law enforcement," (quoting *Bluestein* v. *Skinner*, 908 F.2d 451, 455 (9th Cir. 1990)), such as ensuring safety and deterring drug use in the workplace. *IBT* at 1299. For the same reasons, the proposed rule includes no provisions for warrants and probable cause is not a prerequisite to testing.

Also consistent with the framework of the current program is the limited release of the results under the proposed rule. *Id.* While various forms of testing will be administered without suspicion of alcohol misuse under the proposed rule, in the absence of a probable cause determination made by a Federal, State, or local official the results of such tests will not be used to prosecute a driver criminally, regardless of the level of alcohol ultimately determined to be present in the driver's system. The only consequences for having a prohibited concentration of alcohol which are provided in the proposed rule are driving prohibitions (including CDL revocations or suspensions) and referral to a substance abuse professional. It is only where probable cause is determined under authority granted by State law that a driver may be subject to criminal prosecution for driving under the influence based on an illegal breath alcohol concentration level. *See Michigan* v. *Sitz*, 496 U.S. 444 (1990).

In considering the intrusion on a driver's reasonable expectation of privacy caused by controlled substances testing, the *IBT* court found that commercial motor vehicle operations occur in the context of a highly regulated industry. "The incremental decrease in privacy caused by the search relative to the existing privacy expectations of the drivers" was insubstantial. *IBT* at 1300, citing *Skinner* v. *Railway Labor Executives' Association*, 489 U.S. 602, 624–5 (1989) and *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 671–2 (1989). In addition to the restrictions on movement imposed on all employees as a condition of employment, the FHWA acknowledges that drivers are already required to document biennial physical examinations, including urinalysis, and to record their on-duty time on records of duty status. Both documents are reviewable by employers and government officials.

In practice, what FHWA is proposing under Option 2 is a slight incremental increase in the roadside inspection burden already imposed on drivers. Along with their medical certificate, proof of hours of service, logs, shipping papers, proof of insurance in certain cases, and commercial driver's licenses, drivers will be required to provide adequate breath for testing. As part of ongoing and longstanding roadside inspections, this brief, additional procedure will not limit a driver's freedom of movement to the extent that the search's intrusiveness is increased. The roadside location also does not increase the intrusiveness of the test procedure itself or the surprise occasioned by unannounced random tests.

Not all random tests under Option 2 will be conducted, however, along the roadside. In order to ensure scientific randomness, alcohol tests will be conducted at a wide variety of work-related locations. Places such as carrier terminals are likely locations for tests. Under such circumstances the time commitment required of drivers will be less than that involving current controlled substances testing, in which drivers usually must travel to collection sites remote from the terminal.

To be balanced against this "minimal" level of intrusiveness in an environment of "substantially reduced privacy expectations" is the compelling interest of the government in alcohol testing. *IBT* at 1303. The purpose of the alcohol testing program is to detect and deter on-duty alcohol misuse and impairment by commercial motor vehicle drivers, who perform highly safety-sensitive tasks. This "concern for safety and deterrence * * * at least parallels, if not exceeds, the government interests found compelling in [the] earlier [airline, pipeline, and Customs Service employees] cases." *Id.* at 1304. The great number of commercial motor vehicles on the roads, all much larger than most other vehicles and thus capable of inflicting enormous damage, "multiplies the danger to motorists and raises the FHWA's concern for transportation safety to the level of a compelling government interest." *Id.* The balance of interests clearly weighs in favor of the FHWA's program.

While the reasonableness of a testing program does not turn on the existence of less intrusive alternative means, the court in *IBT* nevertheless found that it was not clear that such means as requiring reasonable suspicion for all controlled substances testing would accomplish the deterrent purpose of the program. Given the widespread alcohol problem in society, and the rapid rate at which alcohol is eliminated from the body, random alcohol testing, particularly at the roadside, represents the most effective means of deterring on-duty alcohol use.

Random testing for alcohol, much like that for controlled substances, responds to the operational realities of the motor carrier industry. *Id.* at 1304–5. Drivers work alone and unsupervised for long periods. The opportunity for motor carriers to detect alcohol use by their drivers may be limited to brief encounters at terminals. Therefore, great harm could be inflicted by alcohol impaired drivers before any signs of alcohol misuse are detected.

"Given the unique deterrent effect of random testing and the inefficiency of relying on individualized suspicion in this particular employment context, the FHWA reasonably found the alternative,

less intrusive drug tests to be insufficient to meet its goals." *Id.* at 1305. In similar fashion, the FHWA has determined that alcohol testing, including random and roadside components, is the most efficient method for achieving its statutory mandate of improved highway safety.

V. Commercial Driver's License Program

The Commercial Driver's License (CDL) program is a broad-based initiative to upgrade commercial motor vehicle (CMV) safety by establishing minimum Federal standards for State testing and licensing of CMV drivers, and by disqualifying drivers who develop poor records while operating CMVs. The CDL program applies to virtually all drivers of CMVs meeting or exceeding a 26,001 pound gross vehicle weight rating threshold, hauling placardable amounts of hazardous materials, or carrying 16 or more persons. The only persons excluded or waived from CDL responsibilities are those engaged in purely personal/recreational transportation, uniformed active-duty military personnel, and certain farmers, farm related service industries and firefighters and operators of other emergency vehicles. Unlike other Federal motor carrier safety programs, the CDL applies without distinction to inter- or intrastate commerce, and without regard to the purpose, frequency, duration or amount of the transportation. Thus, for example, drivers of government vehicles, school bus operators, and volunteer drivers of CMVs of all kinds must obtain CDLs and are subject to the corresponding disqualifications.

As of April 1, 1992, except as noted above, every CMV operator must have obtained a State-issued CDL by undergoing extensive knowledge and/or skills testing, providing specified certifications and information, and undergoing driving record checks both at the State level and through the Commercial Driver's License Information System (CDLIS—the national computerized clearinghouse for CMV driver records) and the National Driver Record (addressing problem drivers of all types). The required tests are tailored to the type of vehicle operated; all vehicles are classified by size and handling characteristics, and certain specialized vehicles or hazardous materials loads require specialized testing. Upon issuing a CDL to a driver, a State must identify itself to the CDLIS as the driver's single State of record, thus preventing that driver from obtaining a CDL from another State

CMV operators who are convicted of certain very serious driving offenses involving CMVs—driving under the influence of alcohol or drugs, leaving the scene of an accident, or felonies—will lose their CDLs and all commercial driving privileges for periods of from one year to life, depending on the nature of the offense. Two or more serious traffic violations committed in CMVs—excessive speeding, reckless driving, following too closely, erratic lane changes, or any offenses pertaining to a fatal accident—will lead to disqualifications of CMV driving privileges from 60 to 120 days. The CDLIS, accessed through a nationwide computer information network for State motor vehicle departments, will assure that disqualifying offenses committed anywhere will lead to disqualification by a CDL holder's State of licensure. Thus, the CDL program as currently structured positively enhances the qualifications of the CMV operator workforce nationwide, and provides enforceable consequences against CMV operators exhibiting bad driving behavior in every State.

As currently codified, the CDL regulations do not require CMV drivers to undergo testing for alcohol use beyond the testing traditionally performed by States in traffic law enforcement. However, the existing regulations constitute a marked improvement over prior treatment of alcohol offenses by these drivers in that—

1. The CDLIS prevents drivers from obtaining multiple licenses, which formerly allowed drivers to spread alcohol and other convictions over multiple States of record;

2. The CDLIS and its supporting information network allow alcohol convictions to be forwarded speedily to the driver's State of record for licensing action;

3. The threshold at or above which a CMV driver is deemed to be driving under the influence, hence subject to severe penalties, is now 0.04 breath alcohol concentration, rather than the 0.10 prevalent in most States prior to CDL;

4. The disqualification periods for alcohol-related offenses—one year for the first offense, three years for the first offense involving hazardous materials, lifetime (commutable upon rehabilitation to 10 years) for the second offense, and lifetime (noncommutable) for the third offense—in themselves constitute a powerful deterrent against alcohol use by CMV drivers;

5. The requirement that States place drivers who are found to have any measured or detected presence of alcohol out-of-service for 24 hours provides a further consequence to CMV operators' use of intoxicating beverages, as required in § 392.5; and

6. The implied consent provision of § 383.72 requires each driver of a CMV who holds a CDL to have given his/her prior consent to be tested for the use of alcohol by any State or jurisdiction in the enforcement of §§ 383.51(b)(2)(i) and 395.5(a)(2). The FHWA is proposing to amend this provision in this rulemaking to include alcohol testing administered by State and local officials under MCSAP.

As of April 1, 1992, all States should be enforcing the 0.04 BAC requirement as part of the CDL implementation and most States have passed enabling legislation. Thus, the CDL program provides a strong foundation for the additional alcohol testing requirements proposed herein.

VI. Motor Carrier Safety Assistance Program (MCSAP)

The Motor Carrier Safety Assistance Program is a Federal/State matching grant-in-aid program which was initially created by Section 402 of the Surface Transportation Assistance Act (STAA) of 1982 (Pub.L. 97–424, 96 Stat. 2097). Since the initial authorization, the program has received tremendous public, State and Federal support resulting in further congressional reauthorizations. The most recent was a six year reauthorization through FY 1997 in the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) (Pub.L. 102–240, 105 Stat. 1914).

The intent of MCSAP is to achieve a national uniform motor carrier safety program. In an effort to achieve this goal, the FHWA provides grants only to States which enforce Federal or compatible State motor carrier safety and hazardous materials regulations.

Title IV of the ISTEA is the Motor Carrier Act of 1991, and specifically in section 4002, this new legislation adds several dimensions to the MCSAP funding eligibility criteria for States' participation in MCSAP. Pursuant to this section, participating States may use MCSAP funds for specific enforcement activities such as alcohol and controlled substance detection and enforcement, provided such "activities are carried out in conjunction with an appropriate type of inspection of the commercial motor vehicle for enforcement of Federal or State commercial motor vehicle safety regulations."

Currently, there are 48 States and four United States territories participating in MCSAP. As a result, over 1.5 million

roadside inspections are conducted annually on commercial motor vehicles and/or drivers by approximately 2,800 State enforcement officials in accordance with the Federal Motor Carrier Safety Regulations (FMCSRs) or compatible State safety regulations. During these inspections, over 497,000 vehicles and over 126,000 drivers have been placed out-of-service for violations of Federal or State safety regulations.

In order to receive MCSAP funding for inspection activities and enforcement, States are required to submit a "State Enforcement Plan" to the FHWA outlining the enforcement activities contemplated during that year in accordance with the procedures set forth in 49 CFR part 350. Part 350 has been revised to include requirements of the ISTEA.

In this NPRM, the FHWA is proposing, as one option, that motor carriers can achieve compliance with the random alcohol testing provisions of this part through a MCSAP-funded approach. The FHWA believes that this approach merits consideration since it would provide a much stronger deterrent than now exists against driving a commercial motor vehicle in commerce with a measured level or detected presence of alcohol. This deterrent would draw its strength from a driver's increased exposure through MCSAP-funded roadside inspections and, if this proposal is adopted, the corresponding likelihood of having a random breath alcohol test during those inspections. The MCSAP-based proposal assumes that the greater a driver's exposure to being tested, the more he or she will be discouraged from using or possessing alcohol while or prior to driving a CMV. Under this proposal for random alcohol testing, a CMV driver would have to be prepared to demonstrate fitness, through an alcohol test which shows no alcohol concentration of 0.04 or greater, to perform the driving task at random times and locations. The FHWA is proposing the State/MCSAP-based Program proposal because it believes that in enacting the Omnibus Transportation Employee Testing Act of 1991 and the Commercial Motor Vehicle Safety Act of 1986, the Congress intended that the FHWA and the States work together to remove unsafe CMV operators from the road, especially when those operators drink and drive.

The FHWA is given the discretion in the Act to establish appropriate penalties for drivers of CMVs who are determined to have unlawfully used, but who were not under the influence of, alcohol (i.e., 0.04 BAC or greater) or a controlled substance. This proposed rule sets such penalties commensurate with those for serious traffic violations under CDL provisions. The penalties for drivers of CMVs who are convicted of driving under the influence of alcohol or a controlled substance are unchanged from current CDL provisions—disqualification from one year to life. The FHWA believes the proposed consequences will complement existing State drunk driving laws and programs.

The FHWA believes that this option would be implemented as a small incremental increase to the current general roadside inspection responsibilities. The FHWA believes that an alcohol test with an initial alcohol concentration of less than 0.02 will last approximately 5 minutes and may be done separately or in conjunction with a roadside inspection. Tests with an initial result of 0.02 or greater must be performed a second time after an elapsed period of 15 minutes. Complete roadside inspections last from 20 to 60 minutes currently. The FHWA believes that an initial test would be done at the beginning of an inspection and if a confirmation test is required, the confirmation test would be performed later in the inspection process. The 15 minute time period required by 49 CFR part 40 would be filled by the MCSAP officer performing other inspection duties such as inspecting the motor vehicle.

The option proposed herein may slightly reduce the number of vehicle safety inspections per day, however, the FHWA believes that added benefits will occur by deterring alcohol use while driving a commercial motor vehicle which will reduce the number of accidents. Will the alcohol testing rate have a significant negative impact on how many vehicle inspections may be done per day? Will this impact produce a smaller overall societal benefit, such as increased accidents, more injuries, fatalities, etc.?

The FHWA believes that a random testing program that is highly visible to drivers will deter substance misuse. Will testing at a 10, 25, or 50 percent testing rate provide the best deterrence for the overall FHWA program? Which testing rates will cost the program too much for current funding? Should the FHWA consider imposing a user fee, as suggested in the common preamble published elsewhere in today's **Federal Register**, to pay for any increased costs to the MCSAP program? The FHWA seeks comments and answers to these questions from all interested parties.

VII. Proposal

A new part 382 to title 49, Code of Federal Regulations, Controlled Substances and Alcohol Use and Testing, is proposed which would be added to the FMCSR and would contain the new requirements of the Omnibus Transportation Employee Testing Act of 1991. Most notably, as this Act amends the Commercial Motor Vehicle Safety Act of 1986, the Act expands the category of persons required to be tested for controlled substances and imposes alcohol testing requirements on the same category. This NPRM is proposing the alcohol-related sections of the new part to be set forth in subparts A through F. A companion NPRM on controlled substances testing, also published in today's **Federal Register**, includes subparts G through L of part 382, which incorporates the current controlled substances testing requirements of 49 CFR part 391, subpart H into this new part 382.

The FHWA's experience in administering the three-year-old controlled substances testing requirements, and its consideration of comments (OST Docket No. 46574, Notice No. 89–22) received in response to the November 2, 1989, ANPRM (54 FR 46326) and other comments are reflected in this proposal. Based on further comments received on this NPRM and the companion NPRM on controlled substances, the FHWA will consider integration of the two proposals in one final rule.

SECTION-BY-SECTION ANALYSIS

PART 350—COMMERCIAL MOTOR CARRIER SAFETY ASSISTANCE PROGRAM

Section 350.9 Conditions for Basic Grant Approval

The FHWA proposes to require States to include part 382 under the conditions for basic implementation grant approval. Consistent with the State MCSAP-based proposal, random alcohol testing by MCSAP officers would be a condition of the grant for fiscal year 1995. If a State chooses not to conduct alcohol testing of CMV drivers, that State would be denied all MCSAP funds.

The FHWA is not proposing that a State implement random alcohol testing upon the effective date of the final rule. Rather, the FHWA is proposing to allow States an amount of time similar to that generally provided during the development stage of the original MCSAP implementation process in order to obtain new authorizations, laws, rules, regulations, training, acquisition of equipment and supplies and other administratively required items that must be obtained prior to

implementation. The FHWA is proposing to allow States up until October 1, 1996 to begin random alcohol testing.

Section 350.13 State Enforcement Plan (SEP) for a Basic Grant

Paragraph (b)(8) would require the State to place in the SEP that random alcohol testing of CMV drivers would be a part of an appropriate type of driver inspection by the beginning of the fiscal year starting at least two years from the publication of this proposal as final.

PART 382—CONTROLLED SUBSTANCES AND ALCOHOL USE TESTING

The FHWA is issuing these proposed alcohol testing rules in cooperation with the other DOT agencies required by the Omnibus Transportation Employee Testing Act. The rules proposed herein are similar to alcohol testing regulations published by the FAA, FRA, FTA, and RSPA elsewhere in today's **Federal Register**. The Office of the Secretary of Transportation is publishing today a common preamble on general requirements and a common rule on testing procedures also. The following Section-by-Section Analysis only covers sections and areas that are unique to the FHWA rule or which differ from the common rule and common preamble.

Subpart A—Alcohol Use and Testing

Section 382.103 Applicability

Currently, the FHWA's controlled substances testing requirements are part of the driver qualification standards. The requirements apply to motor carriers and drivers of the motor carriers who are involved in interstate commerce and are subject to the FMCSRs. Private and for-hire motor carriers of property and for-hire motor carriers of passengers are subject to the FMCSRs. However, the FMCSRs include several general exemptions for certain types of transportation, such as fire trucks and rescue vehicles involved in an emergency, governmental operations and school bus operations. Therefore, drivers involved in the exempted transportation operations are not currently required to comply with the FHWA's controlled substances testing requirements. In addition, anyone who is not required to meet the physical qualification requirements, such as farm custom operations, apiarian industries and certain farm vehicle drivers, are also exempt from the controlled substances testing requirements. Finally, while the FMCSRs generally apply to commercial motor vehicles exceeding 10,000 pounds GVWR, the drug testing provisions of part 391 apply only to drivers of commercial motor vehicles exceeding 26,000 pounds GVWR.

The Act amends the CMVSA, and therefore, the definitions of "commercial motor vehicle" and "commerce" in the CMVSA apply. This means that the testing requirements of the Act extend to interstate and intrastate operations in commercial motor vehicles exceeding 26,000 pounds GVWR and that the FMCSR exemptions stated above and listed in 49 CFR 390.3(f) do not apply.

The FHWA is therefore proposing that the drivers who are required to obtain a CDL are the same drivers who would be subject to the alcohol testing requirements of this rule. Because they are the subject of a companion rule, the FHWA is also proposing that motor carriers and drivers for those motor carriers subject to the alcohol and controlled substances testing requirements of the Federal Transit Administration (FTA), formerly the Urban Mass Transportation Administration, be excluded from the requirements of this rule. Drivers subject to the FTA rule who hold CDLs will continue, however, to be subject to the CDL disqualifications provided in part 383.

By the same token, the FHWA is proposing that any entity operating under a waiver of all CDL requirements, approved or authorized by the FHWA, would not be subject to the alcohol testing requirements of the Act. The measure of applicability is: if a person is required to obtain a CDL, that driver and the motor carrier using the driver must comply with these proposed alcohol testing requirements.

This means there would be certain entities who are not required to comply with the FMCSRs, but who would now be subject to the requirements of this rule. For example, governmental and school bus drivers as well as drivers of private motor carriers of passengers would be required to submit to tests. Governmental operations include all levels of government, Federal, State and local. Private motor carriers of passengers would include, but not be limited to, civic and church organizations.

Table I shows which groups have waivers or restricted CDLs and which groups will be required to be tested under this rule.

TABLE I.—COMMERCIAL DRIVER'S LICENSE (CDL) WAIVERS

Type	CDL requirement	Tests required
Full Waiver of all CDL requirements for vehicles owned/operated by Dept. of Defense		
Non-Civilian Military Personnel: —Active Duty Military Personnel —Active Duty Reserves and Nat'l Guard —National Guard Military Technicians	No CDL required	No controlled substances or alcohol testing required under 49 CFR Pt. 382.
State Option Waiver—States may waive all CDL requirements, if waiver conditions are met		
Farm Vehicle Operators	If State waives the individual	No testing is required.
	If State DOES NOT waive the individual	Controlled Substances and Alcohol testing is required
Firefighters and Other Operators of Emergency Equipment.	If State waives the individual	No testing is required.
	If State DOES NOT waive the individual	Controlled Substances and Alcohol testing is required.

TABLE I.—COMMERCIAL DRIVER'S LICENSE (CDL) WAIVERS—Continued

Type	CDL requirement	Tests required
Limited Waiver/Restricted CDL—States may waive CDL knowledge and skills testing and issue restricted CDLs		
Farm-Related Service Industries —Farm retail outlets & suppliers —Agri-chemical businesses —Livestock feeders —Custom Harvesters	The operators of these vehicles ARE required to obtain a Restricted CDL.	See Note.
Isolated Sections of Alaska	The operators of these vehicles ARE required to obtain a Restricted CDL.	See Note.

Note: Controlled substances and alcohol testing is required of these operators. Additionally, these operators shall have a pre-employment/pre-duty test for controlled substances and alcohol each time the State requires the license to be revalidated for these operators.

The FHWA is proposing the same applicability with the CDL to comply with the intent of Congress and estimates that this proposal will affect approximately five million drivers.

Paragraph (c) of this section excepts those drivers from alcohol testing requirements who are based at or depart from home terminals in foreign nations. Implementation of alcohol testing of foreign-domiciled commercial motor vehicle operators, mandated by the Act, will be considered in an advanced notice of proposed rulemaking published elsewhere in today's **Federal Register**. Comments on this issue should be submitted to that docket.

Section 382.107 Definitions

The definitions unique to this part are included in this section. The terms common to title 49, chapter III, subchapter B are already included in 49 CFR 390.5, Definitions, and are applicable to this part, unless otherwise defined. The terms *commerce* and *commercial motor vehicle* are taken from 49 CFR part 383, the requirements for a CDL. These definitions expand the applicability to intrastate operations as well as the other operations currently exempted from the FMCSRs.

The term *accident* is proposed and is identical to that being proposed by the FHWA in another rulemaking on accident-reporting requirements. See July 30, 1992, of the **Federal Register**, 57 FR 33712.

The term *alcohol* is defined as ethyl alcohol. The FHWA is proposing in this NPRM to make a conforming change to 49 CFR 392.5 by replacing the term, *intoxicating beverage*, with *alcoholic beverage* and to define alcoholic beverage in 49 CFR 390.5.

The term *commerce* and *commercial motor vehicle* are identical to those included in 49 CFR part 383.

The term *on-duty* is proposed to be defined here and a conforming amendment to 49 CFR 395.2, Definitions, is also being proposed to ensure that motor carriers maintain control over the alcohol testing procedures in those cases where the motor carrier directs the driver to provide adequate breath for testing under the requirements of this rule. The FHWA strongly encourages comments on this proposal.

The FHWA is also proposing a definition of the term "consortium" to indicate that persons other than the motor carrier may perform the actual testing and other functions, provided, however, that these functions are at the direction and/or approval (when they are done prior to the motor carrier's knowledge as may be in the case of a driver-based consortium) of the motor carrier. The FHWA will continue to hold the motor carrier responsible for compliance with these proposed requirements.

Subpart B—Prohibitions

As stated in the November 2, 1989, ANPRM on alcohol issues published by OST, the FHWA has had very stringent alcohol use prohibitions in the FMCSRs. These alcohol prohibitions, which apply to both CMV drivers and motor carriers, are included in this subpart.

Additionally, the FHWA's current controlled substances testing regulations allow a driver to have an affirmative defense for the use of controlled substances, if the driver has taken the substances at the direction of a medical practitioner. The FHWA would like comments on the possibility of allowing a similar exception in the alcohol testing rules. The FHWA believes that many medications may contain alcohol and that a driver's alcohol test will show an alcohol concentration prohibited by these proposed rules. Should FHWA seriously consider allowing medications to be taken that would contain alcohol?

A possible exception might read as follows:

Medication exception.

(a) A driver may possess and use a medication approved by the Department of Health and Human Services, Food and Drug Administration which contains ethyl alcohol while on-duty driving, notwithstanding §§ 382.201, 382.204, and 382.205 of this subpart, provided:

(1) The medication does not affect driving performance,

(2) The medication is taken consistent with its directions for use, including dosage, frequency, and any limitation on driving motor vehicles or operating heavy machinery, and

(3) The driver's breath alcohol concentration is not 0.04 or greater.

(b) A driver's possession of medication as described in this section, absent other documentable observations as required by § 382.311(b), shall not constitute reasonable suspicion of alcohol misuse.

What non-alcohol alternative medications are there that may be used over-the-counter or prescribed by health care professionals that would be substitutes for medications with an alcohol base? What is the cost of these alternative medications compared to the alcohol based medications? Are there any other issues related to alcohol medications that FHWA should address?

Section 382.209 Use Following an Accident

The FHWA is changing this section from the common rule. The FHWA is removing the phrases addressing motor carriers having to discount the driver's performance as a contributing factor to the accident. The requirements for an FHWA post-accident test require a test after each fatality accident and after the driver receives a citation for a moving traffic violation. The FHWA believes that the act of receiving a citation for a moving traffic violation would indicate that the driver's actions may have contributed to the accident and thus the motor carrier does not need to decide whether the driver's actions may have contributed to the accident.

Subpart C—Tests Required

The FHWA is proposing not to require periodic testing. The Act gives the Secretary such discretion only for this type of testing. Based upon the FHWA's experience with controlled substances testing, the FHWA has decided that periodic testing is not needed. The current controlled substances testing regulations allow motor carriers to eliminate periodic testing upon implementation of a random testing program with testing at the 50% rate. The FHWA acknowledges that many carriers are taking advantage of this authority and are eliminating periodic testing for controlled substances within the two-year cycle. Moreover, the FHWA believes that other forms of testing will adequately detect and deter alcohol use justifying this action. Also, the FHWA is proposing to eliminate periodic testing for the use of controlled substances in a separate rulemaking action in today's **Federal Register**.

Section 382.303 Post-Accident Testing

The FHWA is strongly committed to ensure that drivers who are involved in an accident are tested for the use of alcohol. The FHWA is proposing to use the same criteria for an accident as is currently required in 49 CFR part 391, subpart H with one revision. A motor vehicle which is required to be towed away replaces the amount of property damage criterion.

Post-accident testing may have to be performed not only when an accident occurs while the driver is actually driving a commercial motor vehicle, but also, in an accident involving a fatality, when the driver is performing a safety-sensitive function. For instance, a driver parks a truck improperly, on the travelled portion of the highway. Another motorist collides with the truck and the motorist is killed. The driver of the truck will be required, by this rule, to be tested for alcohol. Post-Accident Testing must also be performed when the driver receives a citation arising from the accident.

The FHWA is differing from the other DOT agencies rules being proposed with regard to the documentation associated with a post accident test. Other agencies are requiring that when an employer does not require an employee to submit, or when an employee is not timely in his/her submission of, adequate breath for testing that a report be prepared and sent to the DOT agency. The FHWA will require such a report to be prepared and kept in the motor carrier's files for review upon a FHWA investigation, but it will not require that the report be sent to the FHWA. The FHWA prefers to have the motor carrier maintain these records along with the other records they must keep for each accident, as required by the FMCSRs. The FHWA investigators would review these reports along with the other documentation during safety compliance reviews.

Although stated in general terms in subpart F of this proposal, the FHWA believes that a statement that motor carriers be required to provide drivers with the necessary post-accident procedures and instructions prior to operating a CMV, on a continuous basis, be made within the body of this section. Additionally, motor carriers would be required to maintain the information relating to the alcohol test or the need for a test, if one was not performed. This information would include the valid reasons when a test was not performed under the recordkeeping requirements in § 382.403 of this proposed rule.

Paragraph (f) allows tests done by Federal, State or local officials having independent authority to require alcohol tests, to meet the requirements of this section *if* the results of the test are obtained by the motor carrier and the testing was performed in conformance with the applicable Federal, State or local requirements for alcohol testing. This means that if a National Park Service Police officer, State Highway Patrol officer, municipal police officer, or similar official has independent authority to require an alcohol test after an accident, this test may be deemed as a completed test by the motor carrier if the official used an approved or applicable testing methodology for his/her jurisdiction and the motor carrier obtains the results of the test. This will allow motor carriers to accept tests done by law enforcement officials, such as, but not limited to, blood tests, saliva tests, or breath tests when these tests are standard for the jurisdiction and are applicable in the jurisdiction of the law enforcement official.

Section 382.305 Random Testing

The FHWA is proposing two options for random testing: A motor carrier-based testing program and a State/MCSAP-based testing program. Under either program the testing rate would be between 10 to 50 percent of the number of drivers (either the number of drivers used by the motor carrier or the number of drivers holding a CDL in a State), to be determined in the final rule stage of this rulemaking.

Motor Carrier-based Program

Under the motor carrier-based program, the motor carrier would select drivers for testing at various times during the year and would ensure that the selection was based on scientifically-valid methods. The driver selected would be notified only when he/she would be able to provide a breath specimen immediately upon notification. That is, the driver once notified, would proceed directly to providing a specimen without performing any other duties. This option is similar to the current random testing requirements for controlled substances.

The FHWA has had many inquiries from owner-operators and the public on how owner-operators comply with the random testing requirements. It has been the Department of Transportation's view that owner-operators are not allowed to have a random testing program on their own. Owner-operators must meet the conditions of random testing, which include that the random selection process be unannounced. The FHWA believes that the requirement of unannounced testing requires that an owner-operator must join a consortium, group or have a neutral, unbiased third party select a date for testing and the third party keeps the date confidential from the driver until that date arrives. Owner-operators, under this proposal, will be expected to perform the same type of random selection process.

State/MCSAP-Based Program

Under the MCSAP proposal, participating MCSAP States will be required to submit their planned random alcohol testing activities as a part of their "State Enforcement Plan" required under 49 CFR part 350. The FHWA is proposing that a State's random alcohol testing plan component must include the following program requirements:

1. The number of random tests performed in the State equal 10 to 50 percent of the number of Commercial Driver's License (CDL) holders in the State as of April 1 each year or as of a date certain mutually agreed upon by the State and the FHWA.

2. Random alcohol testing will be performed in conjunction with other driver and/or vehicle inspections performed under the authority of 49 CFR part 350 at various locations, including, but not limited to, weigh stations, roadside, terminal and other motor carrier fixed locations, and portable locations.

3. Random alcohol testing must be administered in conformance with the requirements of this part and 49 CFR part 40.

4. Random alcohol testing conducted by Federal, State or local officials required under this part and part 350

shall be administered without regard to any reasonable suspicion or probable cause standard found in State or local law. The consequences of such non-reasonable suspicion or non-probable cause random alcohol testing shall be limited to those set forth in this part.

5. Random alcohol testing conducted by Federal, State or local officials where reasonable suspicion or probable cause is independently established without regard to administering random alcohol testing in accordance with this part or part 350 shall be administered in accordance with State and local law and not in accordance with this part. The consequences of such reasonable suspicion or probable cause random alcohol testing shall be determined pursuant to State or local law and if applicable, in accordance with 49 CFR 383.51.

6. A driver's refusal to be tested under this part when requested to do so by a Federal, State or local official pursuant to part 350 or under independent State or local authority for such testing shall be deemed a positive test at the 0.04 BAC level under this part for purposes of CDL disqualification.

7. Pursuant to this part and part 350, the State or local officials participating under this program shall input into SAFETYNET all required random alcohol testing data.

8. Based upon an alcohol breath testing result of 0.02 or greater, the MCSAP officer must provide written notification to the appropriate State of licensure within 5 working days.

To implement this option, the FHWA is considering that States must adopt laws and/or regulations that will establish that BAC levels of 0.02 or greater but less than 0.04 found by MCSAP officials in the course of their inspections are deemed to be serious traffic violations which would disqualify CMV drivers. This proposed action would be required of States to avoid a loss of Federal-aid highway funds, and will be addressed in further detail in the FHWA's forthcoming rulemaking of State compliance with the CDL program. States are currently required to disqualify drivers with BAC levels of 0.04 or greater. Nothing in this proposal prohibits State and local officials from applying reasonable suspicion or probable cause based alcohol breath testing or invoking criminal sanctions for violations of State drunk driving laws.

If the State/MCSAP-based testing program is selected for the final rule, the FHWA will propose in a separate rulemaking action that State licensing authorities amend their CDL definition of the term "serious traffic violation," to include any conviction, when driving a commercial motor vehicle, of a measured alcohol concentration below 0.04 BAC. When this is included in the State's law, the driver licensed in that State would know that a measured alcohol concentration of below 0.04 BAC would result in a disqualification from driving a CMV of 60 or 120 days upon the second or third conviction within a three year period, respectively. If the measured BAC is 0.04 or above the disqualification upon conviction would be from one year to life. The disqualification for BACs of 0.04 or more is already in the CDL law and was published in final rules at 53 FR 39044 and 54 FR 40782, which are codified at § 383.51.

All disqualifications assigned as State responsibilities in this proposal would, of course, remain prerogatives of the FHWA as well. The FHWA and the States are working to develop coordinated processes to assure prompt and effective disqualification procedures.

The FHWA is proposing that the random alcohol testing required by this section and administered by the MCSAP officers is procedurally a mere incremental addition to the current North American Standard Driver Vehicle Inspection, which currently includes inspections of log books, medical examiner certificates and motor vehicle inspections. The FHWA believes that MCSAP officers will not have to obtain any additional State authority to perform alcohol testing as proposed herein. One of the conditions for the implementation and approval processes for MCSAP is that State laws provide for the right of entry and inspection by State personnel sufficient to enforce the FMCSRs or compatible State rules and to perform the activities in the State Enforcement Plan.

The implementation of this proposal would require a MCSAP officer to request that a driver submit adequate breath for testing into an evidential breath testing device in accordance with this part and part 40. If the driver refuses to submit the sample, the MCSAP officer would note the refusal of the request to submit adequate breath for testing on the inspection form and enter the refusal to test into the SAFETYNET system and notify the State of licensure.

MCSAP officers would only be acting as a collector and analyzer of breath to determine if a driver has an alcohol concentration of 0.02 or greater in his/her system. MCSAP officers would place drivers out-of-service at the roadside, as they presently do, when a violation is found, but would not be required under this proposal to arrest drivers or do reasonable suspicion testing of drivers. The States' authority, rights and procedures for testing drivers under reasonable suspicion of alcohol use would remain unchanged by this proposal.

If this option is adopted, the FHWA will also add other recordkeeping requirements, other than those listed in subpart D of this proposal, that motor carriers would be required to maintain.

The FHWA strongly encourages public comments on this option. Is this option workable and enforceable? Are there any changes that should be made to this proposal to make it more workable? Should FHWA base the number of random tests done annually by MCSAP officials on some other standard than the number of commercial driver's licenses issued by the State, such as the number of driver/vehicle inspections performed, or the number of miles travelled by CMVs in that State per year, etc? Will Option 2 overburden the MCSAP driver/vehicle inspection program? The FHWA would like to have critical comments on this option and why the option will or will not work?

Retesting of Covered Employees With an Alcohol Level of 0.02 or Greater But Less Than 0.04

This section in the common rule is not included in this proposal because it conflicts with requirements of the CMVSA. Section 382.505 provides that a person found to have a BAC level of 0.02 or greater but less than 0.04 is prohibited from operating a CMV for a minimum of 24 hours. *See* sec. 12008(d) of the CMVSA.

Section 382.315 Exceptions for Testing Performed by Consortiums

This section, added to the FHWA proposal, provides that preemployment/pre-duty testing and random testing need not be performed directly by the motor carrier provided that the motor carrier directs or approves such testing program prior to using a driver participating in the program. The FHWA recognizes the high driver turnover rate in the motor carrier industry and believes that the provisions of this proposed section will minimize additional unnecessary tests while ensuring that drivers who use alcohol while operating a CMV or on duty are identified and prohibited from performing safety-sensitive tasks.

The proposed conditions in which a motor carrier would be allowed to use a driver without testing the driver for pre-employment/pre-duty are similar to the conditions included in 49 CFR

391.103. The information that a motor carrier is to obtain from a consortium is similar to that contained in 49 CFR 391.103.

Subpart D—Handling of Test Results, Record Retention and Confidentiality

As stated above, if the MCSAP random testing option is adopted, the FHWA will add other recordkeeping requirements, other than those listed herein, that motor carriers would be required to maintain. These would include, but are not limited to:

1. The motor carrier's or driver's copy of the Driver Vehicle Examination Report presented to the driver following a MCSAP driver inspection, and
2. State Out-of-Service Orders issued for violations of subpart B.

Section 382.403 Reporting of Results in a Management Information System

Elsewhere in today's **Federal Register** is a "MIS" NPRM regarding 49 CFR part 40 and 49 CFR part 391, subpart H. The preamble to the 49 CFR part 40 NPRM contains many comments, discussions and questions that should be considered in reviewing this NPRM's § 382.403. Your comments on this NPRM should indicate that you are responding to questions or comments found in the generic NPRM under 49 CFR part 40, this specific NPRM (FHWA Docket No. MC–92–19, the drug testing NPRM (FHWA Docket No. MC–92–23), or the NPRM for changing 49 CFR part 391, subpart H (FHWA Docket No. MC–93–2).

Subpart E—Consequences For Drivers Engaging In Alcohol-Related Conduct

Section 382.505 Other Alcohol-Related Conduct

The FHWA recognizes the acute possibilities for an accident if a person has been using alcohol. Therefore, the current prohibition to keep a driver who has an alcohol concentration of 0.02 or greater from operating a commercial motor vehicle for 24 hours is being proposed in this rule, instead of the requirement of eight hours off duty as used by other DOT agencies and discussed in the common preamble.

Section 382.507 Additional Consequences For Alcohol Concentration Violations

The FHWA is proposing two options for this section. These options parallel the random testing options in that different consequences would apply depending on whether the violation was discovered by a motor carrier or a Federal, State or local official and the level of alcohol concentration. Section 5(f) of the Act directs the Secretary to determine appropriate sanctions for drivers who are determined to have used alcohol through testing developed under this Act or used alcohol in violation of law or Federal regulation, but are not under the influence of alcohol as provided in the CMVSA. Regulations issued pursuant to the CMVSA impose disqualifications and penalties for driving under the influence of alcohol, see § 383.51, and other alcohol misuse. *See* § 392.5.

Option 1

The common rule's paragraph (a) for this section would remain unchanged for this option. For alcohol concentrations of 0.04 or greater, the consequence would entail that the driver not perform safety-sensitive functions, until his/her alcohol concentration is below 0.02 and will be prohibited from driving for a minimum period of 24 hours, as required by the CMVSA. The FHWA is proposing, however, that motor carrier-based testing which indicates alcohol concentrations of 0.04 or greater should result in consequences commensurate with serious traffic violations, as defined in § 383.5. The FHWA considers the alcohol concentration violations to be similar to those identified in part 383 and believes that additional consequences are needed for repeat violators. The FHWA proposes to prohibit drivers who are found to have 0.04 or greater alcohol concentrations on a second, third and subsequent violation of the alcohol concentration rule from driving for 60 or 120 days. The prohibition includes operating a CMV as defined in this part or as defined in 49 CFR part 390. That is, a person violating the prohibitions on having an alcohol concentration of 0.04 or greater proposed in this NPRM would be prohibited from operating a CMV with a gross vehicle weight rating (GVWR) of more than 10,000 pounds in interstate commerce or a CMV with a GVWR of more than 26,000 pounds in both intrastate and interstate commerce. In addition, that person would be prohibited from operating a CMV which is designed to transport 16 or more passengers, including the driver, or transporting material found to be hazardous for the purposes of the Hazardous Materials Transportation Act and which require the motor vehicle to be placarded under the Hazardous Materials Regulations (49 CFR part 172, subpart F) in either intrastate or interstate commerce.

Specifically, the FHWA is proposing increasingly more stringent consequences based on the number of violations over a three year period. The first violation of the prohibitions in § 382.201 would result in the driver being prohibited from driving for a minimum period of 24 hours, and referred by the motor carrier to a substance abuse professional for evaluation of his/her misuse of alcohol, as required in §§ 382.505(a) and 382.605.

A driver who violates the prohibitions twice within a three year period would be prohibited from driving any commercial motor vehicle for a minimum period of 60 days and must be referred to a substance abuse professional by the driver's motor carrier.

A driver who violates the prohibitions three or more times within a three year period would be prohibited from driving any commercial motor vehicle for a minimum period of 120 days and must be referred to a substance abuse professional by the driver's motor carrier.

Option 2

Under the second option, the FHWA is proposing that the consequences identified in option one for alcohol concentrations of 0.04 or greater be applied to all alcohol concentrations. Drivers who are found by a Federal, State or local official to have alcohol concentrations of 0.02 or greater but less than 0.04 would be subject to prohibited driving periods and CDL disqualifications of 60 to 120 days on second, third and subsequent violations. These consequences are intended to rid the highways of drivers who continually violate alcohol misuse prohibitions and thereby pose a threat to the public.

As stated above, under Option 1, when a violation of § 382.201 involving an alcohol concentration of 0.04 or greater is identified by a motor carrier, the motor carrier would be prohibited from using the driver for the periods provided in the rule. The motor carrier would be required to document the violation, and both the motor carrier and the driver would be required to comply strictly with the consequences noted in this section, subject to the additional consequences in paragraphs (d) through (g) for failure to comply. There would be no licensing sanctions.

By contrast, under Option 2 additional consequences, including licensing sanctions, attach for all violations of § 382.201 which are identified by a Federal, State or local official, as opposed to the driver's motor carrier. The FHWA is specifying that a violation of § 382.201, that is, a breath alcohol concentration violation discovered through the means of an

evidential breath testing device operated by a Federal, State or local official, would result in the driver being placed out-of-service for 24 hours through the issuance of an out-of-service order. Furthermore, the driver must report the order to his/her motor carrier within 24 hours. The Federal, State or local official would in turn notify the appropriate State commercial driver licensing authority for the appropriate licensing action. For alcohol concentrations of 0.02 or greater but less than 0.04, the driver's license will be suspended or revoked for 60 or 120 days upon a second and subsequent offenses. The current CDL disqualifications of one year for a first offense and lifetime for subsequent offenses upon conviction of operating a commercial motor vehicle with an alcohol concentration of 0.04 or greater remain applicable.

Proposed paragraph (d) prohibits a driver who refuses to be tested from driving any commercial motor vehicle for no less than one year. The FHWA believes that a strong disincentive to refuse to comply with this proposed rule is needed. This proposal is similar to the requirement of 49 CFR 383.51(b)(3)(i) which requires a driver who refuses to undergo testing required by a State or local jurisdiction under a probable cause determination to be disqualified for one year upon a conviction for such refusal.

Proposed § 382.507(e) would require that motor carriers who knowingly use drivers who have violated these rules, will be subject to 49 U.S.C. 521(b) penalty provisions. These provisions provide for civil forfeiture penalties of up to $10,000 for violations of motor carrier safety regulations.

Proposed § 382.507(f) prohibits a person found to have violated the alcohol use prohibition and testing rules of another DOT agency from operating a CMV until the driver complies with the requirements of that DOT agency.

As explained above, subpart F of this proposed rule includes other actions which must be taken prior to a driver operating a commercial motor vehicle after having violated the prohibitions in §§ 382.201 through 382.211. These actions include an evaluation by the substance abuse professional and a finding that the driver has properly followed any instructions given. A driver needing assistance must also be tested for alcohol use and the results must indicate an alcohol concentration of less than 0.02.

Proposed § 382.507(g) prohibits drivers from driving a commercial motor vehicle following a fatal accident in which their alcohol tests show an alcohol concentration of 0.02 or greater. This prohibition is similar to the current drug rule in part 391, in which a driver is disqualified for one year following a positive drug test result after he or she is involved in a fatal accident. See 49 CFR 391.117(b).

Tables II & III indicate the FHWA proposed consequences for drivers who violate the alcohol concentration prohibition. Table IV indicates the post accident testing requirements and additional penalties that would be imposed for prohibited actions after accidents.

TABLE II.—DRIVER ALCOHOL PROHIBITIONS AND CONSEQUENCES, OPTION 1 DISCOVERED BY A MOTOR CARRIER

[Prohibited Activities—Have a Prohibited Alcohol Concentration]

Consequences				
First offense	Second offense within a three year period	Third offense within a three year period	Refusal to be tested	Violation of an out-of-service order
Alcohol Concentrations of 0.02 and Greater But Less Than 0.04				
Professional referral and 24 hours off duty.	Professional referral and 24 hours off duty.	Professional referral and 24 hours off duty.	One year minimum driving suspension.	First offense: 90 day driving suspension and $1000 penalty. Subsequent offenses: One year minimum up to five year maximum driving suspension and $1000 penalty.
Alcohol Concentrations of 0.04 or Greater				
24 hours out of service, professional referral.	24 hours out of service, professional referral, 60 day driving prohibition.	24 hours out of service, professional referral, 120 day driving prohibition.	Same as above.	Same as above.

TABLE III.—DRIVER ALCOHOL PROHIBITIONS AND CONSEQUENCES, OPTION 2 DISCOVERED BY A FEDERAL, STATE OR LOCAL OFFICIAL

[Prohibited activities—Have a Prohibited Alcohol Concentration]

Consequences				
First offense	Second offense within a three year period	Third offense within a three year period	Refusal to be tested	Violation of an out-of-service order
Alcohol Concentrations of 0.02 and Greater But Less Than 0.04				
Professional referral and 24 hours off duty.	Professional referral and 60 day driving suspension.	Professional referral and 120 day driving suspension.	One year minimum driving suspension.	First offense: 90 day driving suspension and $1000 penalty Subsequent offenses: One year minimum up to five year maximum driving suspension and $1000 penalty.

TABLE III.—DRIVER ALCOHOL PROHIBITIONS AND CONSEQUENCES, OPTION 2 DISCOVERED BY A FEDERAL, STATE OR LOCAL OFFICIAL—Continued

[Prohibited activities—Have a Prohibited Alcohol Concentration]

Consequences				
First offense	Second offense within a three year period	Third offense within a three year period	Refusal to be tested	Violation of an out-of-service order
Alcohol Concentrations of 0.04 or Greater				
24 hours out of service, professional referral, one year disqualification.[1].	24 hours out of service, professional referral within three days, lifetime disqualification.	Not Applicable	Same as above	Same as above.

[1] Suspensions begin at completion of any State licensing review process. Drivers found with a BAC level of 0.04 or greater shall be subject to one year disqualification for a first offense and a lifetime disqualification for a subsequent offense under current CDL rules.

TABLE IV.—POST ACCIDENT ALCOHOL TESTING AND PENALTIES

[Qualifying Accident—Any Accident, as Defined in Part 382, Involving the Death of a Human Being, or any Accident in Which the Driver Receives a Citation for a Moving Traffic Violation (as Defined by State or Local Law)]

Testing Requirements		
Alcohol test	Penalties	Within two hours of accident
	No Fatalities	*Fatal Accident*
Refusal to submit to testing	One year suspension.	One year suspension.
Leave accident scene prior to testing	One year suspension	One year suspension.
Option 1—Alcohol concentration of 0.04 or greater	(1) Professional Referral, (2) 24 hours off duty, (3) Driver must submit adequate breath for testing which has less than a 0.02 result, and (4) Possibly 60 to 120 days driving suspension for second and subsequent times within 3 years.	(1) Professional Referral, (2) One year driving prohibition, and (3) Driver must submit adequate breath for testing which has less than a 0.02 result.
Option 2—Alcohol concentration of 0.02 or greater	(1) Professional Referral, (2) 24 hours off duty, (3) Driver must submit adequate breath for testing which has less than a 0.02 result, and (4) Possibly 60 to 120 days driving suspension for second and subsequent times within 3 years.	(1) Professional Referral, (2) One year driving prohibition, and (3) Driver must submit adequate breath for testing which has less than a 0.02 result.

The FHWA strongly encourages the public to comment on these proposed consequences. The agency encourages critical comments including why the proposed consequences will or will not be sufficient to deter alcohol misuse among CMV drivers.

Section 382.509 Disqualifications

As stated above, the penalty provisions of the CDL regulations are not affected in any way by this proposed rule. The authority of State and local officials to implement the disqualifications included in 49 CFR part 383 are not affected by this proposed rule. Drivers found, upon MCSAP inspection, to have BAC levels of 0.04 or greater will be subject (in addition to the 24-hour period out-of-service and the mandatory referral to a substance abuse professional) to disqualifications of from one year to life under § 383.51(b).

Part 383—Commercial Driver's License Standards; Requirements and Penalties

Section 383.5 Definitions

The FHWA is proposing to add to the existing definition of *Serious traffic violations* in § 383.5 a conviction while operating a CMV with a BAC of either 0.04 (Option 1) or 0.02 (Option 2). See discussion of these options under the discussion of §§ 382.505 and 382.507.

Part 392—Driving of Motor Vehicles

Section 392.5 Alcohol Prohibition

The FHWA proposes to change the name of this section from Intoxicating beverage to Alcohol prohibition to conform this section to the proposed part 382. In addition, the FHWA proposes to revise paragraphs (a)(1) and (a)(2) and paragraph (b)(2) to replace the words intoxicating beverage with the words use alcohol. Also, the FHWA would conform the section to the FHWA's proposed part 382. Paragraph (a)(3) would be revised by deleting the words intoxicating beverage and replacing it with the words alcoholic beverage.

Part 395—Hours of Service of Drivers

Section 395.2 Definitions

The FHWA proposes to revise the definition of on-duty time by adding paragraph (10) which would include all time spent in providing breath and urine samples for testing in accordance with part 382 when directed by a motor carrier to submit to a random, reasonable suspicion, post-accident or follow-up test. The definition would also include all time spent in which a driver is providing breath, urine and blood samples for testing when a Federal, State or local official requests them to provide such samples for testing, regardless of whether the request and the test is in accordance with part 382. Preemployment and return-to-duty testing will not be included in this proposal because daily records of duty status are not required to be completed by drivers who have not yet been hired and those who have been removed from driving functions.

The FHWA has had many inquiries from the public and the motor carrier industry regarding whether the time spent providing urine specimens under part 391, subpart H should be considered as on-duty time or off-duty time. The FHWA believes that a motor carrier's responsibility under part 391, subpart H is to ensure that a controlled substances urine specimen is submitted by a driver and that the test is performed correctly, regardless of who pays for the collection and analysis of the specimen. Similarly, the FHWA believes that a driver's submission of adequate breath for testing for alcohol use is the motor carrier's responsibility, when the test is required by the Omnibus Act.

The FHWA's prior interpretations that time spent by a driver taking a physical examination in accordance with § 391.41 or time spent taking driver's license examinations that were not directed by a motor carrier could be logged as off-duty time on a record of duty status is not comparable to submitting to a controlled substances or alcohol test. When a motor carrier requests a driver, who is currently employed by the motor carrier, to submit adequate breath for testing or a urine specimen, the time associated with that test should be recorded as on-duty time on an applicable record of duty status, regardless of whether the driver is paid for this time.

The FHWA believes that submission of adequate breaths or testing by drivers for a motor carrier's use is similar to other motor carrier requests or expectations for driver services that may or may not be reimbursed or paid by the motor carrier.

VIII. Regulatory Analyses and Notices

Regulatory Impact Analysis

This proposed rule will require motor carriers to test drivers for the use of controlled substances and alcohol use. This rule will affect trucking companies, passenger carriers, State and local governments and anyone who operates a commercial motor vehicle on the public highways.

Executive Order 12291 (Federal Regulation) and DOT Regulatory Policies and Procedures

The FHWA has determined that this document is a major rule under Executive Order 12291 and a significant regulation under the regulatory policies and procedures of the DOT. A draft regulatory impact analysis has been prepared and a copy has been placed in the docket. A summary is included here.

Economic Impact Analysis

The Act requires among other things, testing of safety-sensitive employees in the highway industry for use of alcohol in violation of the law or Federal regulations. The Act specifically mandates privacy in collection techniques, testing safeguards, confirmation of positive results, confidentiality of test results and scientific random selection of employees for testing. The Act further mandates pre-employment, random, post-accident, and reasonable suspicion testing.

Within the framework of these legislative mandates the FHWA is proposing an alcohol testing program that minimizes the economic impact to the industry by utilizing established procedures, equipment, techniques, and safeguards that are already available to, and in use by law enforcement agencies and employers. The proposed rule will not require the development of new technologies, or the need to create an extensive cadre of testing personnel. In the majority of cases, an employer's alcohol testing program will be an incremental expansion of existing drug testing programs, utilizing the same facilities, personnel, and records systems that currently exist.

The following summarizes the preliminary industry cost and benefit evaluation for the final rule on alcohol testing. The rule is intended to prohibit absolutely alcohol concentrations of 0.04 or greater in a driver's breath when operating a commercial motor vehicle. The rule will require pre-employment/pre-duty, random, post-accident, reasonable suspicion, and return-to-duty alcohol testing for approximately 5,000,000 drivers of commercial motor vehicles.

The economic cost to the motor carrier industry will be substantial and include, in addition to the cost of the test, the cost of administering a testing program, the cost of replacement drivers, the occasional court cost, and for owner-operators the potential loss of livelihood.

Notwithstanding these economic costs, the FHWA believes that substantial benefits exceeding the costs will accrue as a result of this proposal. There will be benefits due to the prevention of fatalities, personal injuries, property damage, and lost productivity resulting from accidents attributed to neglect or error on the part of commercial motor vehicle drivers whose judgment or motor skills were impaired by the use of alcohol.

The assumptions and cost factors used in preparing the economic impact estimate have been developed by the FHWA. This regulatory impact analysis is in the docket for this rulemaking and is subject to review. Cost data were furnished by motor carriers, motor carrier industry associations, and trade publications.

The benefit cost analysis is a direct arithmetic comparison between the identified and quantified cost of an alcohol testing program and the economic value of the benefits expected to be derived therefrom. The preliminary cost-benefit analysis is for a ten year period beginning with 1993; assumes three different random testing rates of 10, 25, and 50 percent, a deterrence rate of 50 percent the first year and 70 percent thereafter.

The estimated total cost consists of: setting up and administrating a testing program, the cost of pre-employment, random, post accident, reasonable suspicion, and follow-up testing. Costs were estimated using two alternative methods of testing; the cost of a testing program for all types of testing operated exclusively by the motor carriers and/or their testing contractors, and the cost of a program with all random testing operated by State motor carrier enforcement personnel and the remaining testing by the motor carrier or their testing contractors.

The estimated value of the benefits is the cost associated with projected reduction in commercial motor vehicle accidents by the assumed 3.7 percent of drivers that will have an alcohol concentration of 0.04 or greater and includes fatalities, injuries, property damage, traffic delays, and emergency services that will not occur by removing or deterring these drivers from the highways.

Summary of Benefits and Costs

Costs and benefits are total for the 10 year analysis period in assumed 1993 dollars.

Name of testing program	Random testing rate (percent)	Ten year benefits (billions)	Ten year costs (billions)	Benefit cost ratio
Motor Carrier	10	$3.92	$.731	5.36
Do	25	3.92	1.02	3.84
Do	50	3.92	1.502	2.61
Motor Carrier and Enforcement Personnel	10	3.92	.74	5.3
Do	25	3.92	.78	5.0
Do	50	3.92	.84	4.7

In other words for every $1.00 spent on this testing program there would be returned in benefits $2.61 to $5.36.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354), the FHWA has evaluated the effects of this rulemaking on small entities. This final rule would require motor carriers to test drivers for the use of alcohol. It will have a significant adverse economic impact on small entities. Because the Omnibus Act mandates alcohol testing irrespective of the size of the entities, the FHWA is unable to lessen the economic impact on them.

For these reasons, the FHWA hereby certifies that this action will have a significant economic impact on a substantial number of small entities.

Executive Order 12612 (Federalism Assessment)

This proposal adds part 382 of the FMCSRs pertaining to testing for controlled substances and alcohol by drivers of commercial motor vehicles operating in commerce on public roads and highways. These proposed requirements directly affect motor carriers and the drivers for these motor carriers. This document preempts State or local laws and regulations that are inconsistent with this proposed rule, as required by the Omnibus Transportation Employee Testing Act of 1991. Therefore, the agency does not have to prepare a Federalism Assessment for this proposal.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.217, Motor Carrier Safety. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.

Paperwork Reduction Act

The information collection requirements in part 382, subpart D and § 395.2 of this rule have been submitted to the Office of Management and Budget for approval under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*

National Environmental Policy Act

The agency has analyzed this action for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and has determined that this action would not have any effect on the quality of the environment.

Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects in 49 CFR Parts 350, 382, 383, 392, and 395

Controlled Substances, Highways and roads, Highway safety, Motor carriers, Motor vehicle safety.

Issued on: December 2, 1992.

Andrew H. Card Jr.,

Secretary of Transportation.

Thomas D. Larson,

Administrator.

In consideration of the foregoing, the FHWA proposes to amend title 49, CFR subtitle B, chapter III, parts 350, 383, 392 and 395, and add part 382 as set forth below:

PART 350—COMMERCIAL MOTOR CARRIER SAFETY ASSISTANCE PROGRAM

1. The authority citation for part 350 continues to read as follows:

Authority: 49 U.S.C. app. 2301–2304, 2505–2507; 49 U.S.C. 3102; Sec.15(d), Pub. L. 101–500, 104 Stat. 1213, 1219; Secs. 4002 and 4009, Pub. L. 102–240, 105 Stat. 2140; 49 CFR 1.48.

2. In § 350.9, paragraph (q), is added to read as follows:

§ 350.9 Conditions for basic grant approval.

* * * * *

(q) The State shall adopt and enforce the requirements of 49 CFR part 382 with respect to random alcohol testing of commercial motor vehicle operators by October 1, 1996.

3. In § 350.13, paragraph (b)(8) is added to read as follows:

§ 350.13 State enforcement plan (SEP) for a basic grant.

* * * * *

(b) * * *

(8) Describe the efforts taken by the State to adopt and enforce the requirements of 49 CFR part 382 with respect to random alcohol testing of commercial motor vehicle drivers; and

* * * * *

4. Chapter III is amended by adding part 382 as follows:

PART 382—CONTROLLED SUBSTANCES AND ALCOHOL USE AND TESTING

Subpart A—Alcohol; General

Sec.
382.101 Purpose.
382.103 Applicability.
382.105 Alcohol testing procedures.
382.107 Definitions.
382.109 Preemption of State and local laws.
382.111 Other requirements imposed by motor carriers.
382.113 Requirement for notice.
382.115 Starting date for alcohol testing programs.

Subpart B—Prohibitions

382.201 Alcohol concentration.
382.203 Behavior or appearance.
382.204 Alcohol possession.
382.205 On-duty use.
382.207 Pre-duty use.
382.209 Use following an accident.
382.211 Refusal to submit to a required alcohol test.

Subpart C—Tests Required

382.301 Pre-employment/pre-duty testing.
382.303 Post-accident testing.
382.305 Random testing.
382.307 Reasonable suspicion testing.
382.309 Return-to-duty testing.
382.311 Follow-up testing.
382.313 [Reserved]
382.315 Exceptions for testing performed by consortiums.

Subpart D—Handling of Test Results, Record Retention, and Confidentiality

382.401 Retention of records.
382.403 Reporting of results in a management information system.
382.405 Access to facilities and records.

Subpart E—Consequences for Drivers Engaging in Alcohol-Related Conduct

382.501 Removal from safety-sensitive function.
382.503 Required evaluation and testing.
382.505 Other alcohol-related conduct.
382.507 Additional consequences for alcohol concentration violations.
382.509 Disqualifications.

Subpart F—Alcohol Misuse Information, Training, and Referral

382.601 Motor carrier obligation to promulgate a policy on the misuse of alcohol.
382.603 Training for supervisors.
382.605 Referral, evaluation, and treatment.

Authority: 49 U.S.C. app. 2505; 49 U.S.C. app. 2701 *et seq.*; 49 U.S.C. 3102; 49 CFR 1.48.

Subpart A—General

§ 382.101 Purpose.

The purpose of this part is to establish programs designed to help prevent accidents and injuries resulting from the misuse of alcohol by drivers of commercial motor vehicles.

§ 382.103 Applicability.

(a) This part applies to all motor carriers and drivers as defined in this part who are required under part 383 of this chapter to obtain a commercial driver's license, except for motor carriers and their drivers who are required to conform to the alcohol testing requirements of the Federal Transit Administration of the Department of Transportation found in part 654 of this title or have obtained a full waiver or State option waiver from the Part 383 requirements.

(b) A motor carrier who employs himself/herself as a driver must comply with both the rules in this part that apply to motor carriers and the rules in this part that apply to drivers, except the motor carrier who employs himself/herself as a driver shall not implement an alcohol testing program that only includes himself/herself as a participant.

(c) The requirements of this part do not apply to any employee whose place of reporting or point of departure *(home terminal)* for motor carrier transportation services is located outside the territory of the United States.

§ 382.105 Alcohol testing procedures.

Each motor carrier shall ensure that all alcohol testing conducted under this part complies with the procedures set forth in part 40 of this title. The provisions of part 40 of this title that address alcohol testing are applicable to motor carriers by this part.

§ 382.107 Definitions.

As used in this part—

Accident means an occurrence involving a commercial motor vehicle engaged in the operations of a motor carrier who is subject to this part resulting in:

(1) The death of a human being; or

(2) Bodily injury to a person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident; or

(3) One or more motor vehicles incurring disabling damage as a result of the accident and transported away from the scene by a tow truck or other motor vehicle.

Alcohol means ethyl alcohol (ethanol).

Alcohol concentration (or content) means the alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by an evidential breath test under this part. When the indicated alcohol concentration of a driver on an initial alcohol test is different from an indicated alcohol concentration on a confirmatory test, the driver shall be considered to have the lower indicated concentration.

Alcohol use means the consumption of any beverage, mixture, or preparation, including any medication, containing alcohol.

Commerce means (1) any trade, traffic or transportation within the jurisdiction of the United States between a place in a State and a place outside of such State, including a place outside of the United States and (2) trade, traffic, and transportation in the United States which affects any trade, traffic, and transportation described in paragraph (1) of this definition.

Commercial motor vehicle means a motor vehicle or combination of motor vehicles used in commerce to transport passengers or property if the motor vehicle—

(1) Has a gross combination weight rating or gross combination weight of 26,001 or more pounds inclusive of a towed unit with a gross vehicle weight rating or gross vehicle weight of more than 10,000 pounds; or

(2) Has a gross vehicle weight rating or gross vehicle weight of 26,001 or more pounds; or

(3) Is designed to transport 16 or more passengers, including the driver; or

(4) Is of any size and is used in the transportation of materials found to be hazardous for the purposes of the Hazardous Materials Transportation Act and which require the motor vehicle to be placarded under the Hazardous Materials Regulations (49 CFR part 172, subpart F).

Confirmatory test means a second analytical procedure, separate from the screening test, to determine the concentration of alcohol in a driver's system. The confirmatory test may or may not use a different chemical principle from that of the screening test, but shall employ a scientifically recognized method of testing capable of providing quantitative data regarding alcohol concentration. For specific requirements concerning evidential breath testing devices see part 40 of this title.

Consortium means an entity, including a group or association of employers, motor carriers, or contractors that provides alcohol testing as required by this part or other DOT alcohol testing rules and that acts on behalf of the employers.

Covered employee means a driver. For the purposes of preemployment/pre-duty testing only, the term covered employee includes a person applying to perform a safety-sensitive function.

Disqualification means either:

(1) The suspension, revocation, cancellation, or any other withdrawal by a State of a driver's privileges to drive a commercial motor vehicle; or

(2) A determination by the FHWA, under the rules of practice for motor carrier safety contained in Part 386 of this title, that a driver is no longer qualified to operate a commercial motor vehicle under Part 391; or

(3) The loss of qualification which automatically follows conviction of an offense listed in §§ 383.51 or 391.15 of this chapter; or

(4) The loss of qualification which automatically follows a violation of the alcohol prohibitions as specified in this subchapter.

DOT Agency means an agency (or "operating administration") of the United States Department of Transportation administering regulations requiring alcohol testing (14 CFR parts 65, 121, and 135; 49 CFR parts 199, 219, 382 and 654) in accordance with part 40 of this title.

Driver means any person who operates a commercial motor vehicle. This includes, but is not limited to, full time, regularly employed drivers; casual, intermittent or occasional drivers; leased drivers and independent, owner-operator contractors who are either directly employed by or under lease to a motor carrier or who operate a commercial motor vehicle at the direction of or with the consent of a motor carrier. For the purposes of preemployment/pre-duty testing only, the term driver includes a person applying to a motor carrier to drive a commercial motor vehicle.

Employer means a motor carrier and any other person designated in a DOT agency alcohol rule as an employer.

Initial alcohol test (or screening test) means an analytical procedure to determine whether a driver may have a prohibited concentration of alcohol in his or her system.

Motor carrier means any person (including the United States, a State, the District of Columbia or a political subdivision of a State) who owns or leases a commercial motor vehicle or assigns persons to operate such a vehicle. The term *motor carrier* includes a motor carrier's agents, officers and representatives as well as employees responsible for hiring, supervising, training, assigning, or dispatching of drivers and employees concerned with the installation, inspection, and maintenance of commercial motor vehicle equipment and/or accessories.

On-duty means all on duty time as defined in § 395.2 *On-duty time* of this chapter and includes all time submitting to the breath testing process for alcohol

testing and performing any other functions contained in this part and in part 40 of this title with respect to alcohol testing.

Performing (a safety-sensitive function) means a driver is considered to be performing a safety-sensitive function during any period in which he or she is actually performing, ready to perform, or immediately available to perform any of those on-duty functions set forth in § 395.2 *On-Duty time*, paragraphs (1) through (7) of this chapter.

Refuse to submit (to an alcohol test) means that a driver fails to provide adequate breath for testing without a valid medical explanation after he or she has received notice of the requirement to be tested in accordance with this part, or engages in conduct that clearly obstructs the collection process. The notice of the requirement to be tested may be made by the motor carrier or a Federal, State, or local official.

Safety-sensitive function means any of those on-duty functions set forth in § 395.2 *On-Duty time*, paragraphs (1) through (7) of this chapter.

Substance abuse professional means a licensed physician (Medical Doctor or Doctor of Osteopathy), or a licensed or certified psychologist, social worker, or employee assistance professional with knowledge of and clinical experience in the diagnosis and treatment of alcohol-related disorders.

§ 382.109 Preemption of State and local laws.

(a) Except as provided in paragraph (b) of this section, this part preempts any State or local law, rule, regulation, or order to the extent that:

(1) Compliance with both the State or local requirement and this part is not possible; or

(2) Compliance with the State or local requirement is an obstacle to the accomplishment and execution of any requirement in this part.

(b) This part shall not be construed to preempt provisions of State criminal law that impose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property, whether the provisions apply specifically to transportation employees (including drivers) or employers (including motor carriers) or to the general public.

§ 382.111 Other requirements imposed by motor carriers.

Except as expressly provided in this part, nothing in this part shall be construed to affect the authority of motor carriers, or the rights of drivers, with respect to the use or possession of alcohol, including authority and rights with respect to alcohol testing and rehabilitation.

§ 382.113 Requirement for notice.

Before performing an alcohol test under this part, each motor carrier or Federal, State, or local official shall notify a driver that the alcohol test is required by this part. No motor carrier or Federal, State or local official shall falsely represent that a test is administered under this part.

§ 382.115 Starting date for alcohol testing programs.

(a) *Large motor carriers.* Each motor carrier with fifty or more drivers on [The Effective Date of the Final Rule] shall implement the requirements of this part on [Date One Year After the Effective Date of the Final Rule].

(b) Small motor carriers. Each motor carrier with fewer than fifty drivers on [The Effective Date of the Final Rule] shall implement the requirements of this part on [Date Two Years After the Effective Date of the Final Rule].

(c) All motor carriers shall have an alcohol misuse program that conforms to this part by [Date Two Years After the Effective Date of the Final Rule] or by the date a motor carrier begins motor carrier operations, whichever is later.

Subpart B—Prohibitions

§ 382.201 Alcohol concentration.

No driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions while having an alcohol concentration of 0.04 or greater. No motor carrier having actual knowledge that a driver has an alcohol concentration of 0.04 or greater shall permit the driver to perform or continue to perform safety-sensitive functions.

§ 382.203 Behavior or appearance.

Notwithstanding the absence of a reasonable suspicion test under § 382.307, no driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions while the driver's behavior or appearance is characteristic of alcohol misuse or the driver's ability to perform his or her assigned functions is adversely affected by alcohol use. No motor carrier having actual knowledge that the driver is in violation of this section shall permit a driver to perform or continue to perform safety-sensitive functions.

§ 382.204 Alcohol possession.

No driver shall be on duty or operate a commercial motor vehicle while the driver possesses alcohol unless the alcohol is manifested and transported as part of a shipment. No motor carrier having actual knowledge that a driver possesses unmanifested alcohol may permit the driver to drive or continue to drive a commercial motor vehicle.

§ 382.205 On-duty use.

No driver shall use alcohol while performing safety-sensitive functions. No motor carrier having actual knowledge that a driver is using alcohol while performing safety-sensitive functions shall permit the driver to perform or continue to perform safety-sensitive functions.

§ 382.207 Pre-duty use.

No driver shall perform safety-sensitive functions within four hours after using alcohol. No motor carrier having actual knowledge that such a driver has used alcohol within four hours shall permit a driver to perform or continue to perform safety-sensitive functions.

§ 382.209 Use following an accident.

No driver who has an accident while performing safety-sensitive functions shall use alcohol for eight hours following the accident, unless the driver has been given a post-accident test under § 382.303 of this part.

§ 382.211 Refusal to submit to a required alcohol test.

No driver shall refuse to submit to a post-accident alcohol test required under § 382.303, a random alcohol test required under § 382.305, a reasonable suspicion alcohol test required under § 382.307, or a follow-up alcohol test required under § 382.311. No motor carrier shall permit a driver who refuses to submit to such a test to perform or continue to perform safety-sensitive functions.

Subpart C—Tests Required

§ 382.301 Pre-employment/pre-duty testing.

(a) Prior to the first time a driver performs safety-sensitive functions for a motor carrier, the driver shall undergo testing for alcohol. No motor carrier shall allow a driver to perform safety-sensitive functions, unless the driver has been administered an alcohol test with a result indicating an alcohol concentration less than 0.04. If a pre-employment/pre-duty test result under this section indicates an alcohol content of 0.02 or greater but less than 0.04, the provisions of § 382.505 shall apply.

(b) A motor carrier is not required to administer an alcohol test required by paragraph (a) of this section, if:

(1) The driver has undergone an alcohol test required by this section or the alcohol misuse rule of another DOT agency under part 40 of this title within the previous six months, with a result indicating an alcohol concentration less than 0.04; and

(2) The motor carrier ensures, by obtaining the information required by § 382.315(b), that no prior motor carrier of the driver of whom the motor carrier has knowledge has records of a violation of this part or the alcohol misuse rule of another DOT agency within the previous six months.

§ 382.303 Post-accident testing.

(a) As soon as practicable following an accident involving a commercial motor vehicle, each motor carrier shall test for alcohol each surviving driver:

(1) Who was performing safety-sensitive functions with respect to the vehicle, if the accident involved the loss of human life; or

(2) Who receives a citation under State or local law for a moving traffic violation arising from the accident.

(b) If a test required by this section is not administered within two hours following the accident, the motor carrier shall prepare a written report to be kept in the motor carrier's files stating the reasons the test was not promptly administered. If a test required by this section is not administered within eight hours following the accident, the motor carrier shall cease attempts to administer an alcohol test and shall prepare the report.

(c) A driver who is subject to post-accident testing who leaves the scene of an accident without a valid reason prior to submission to such test may be deemed by the motor carrier to have refused to submit to testing. Nothing in this section shall be construed to require the delay of necessary medical attention for injured people following an accident or to prohibit a driver from leaving the scene of an accident for the period necessary to obtain assistance in responding to the accident or to obtain necessary emergency medical care.

(d) A motor carrier shall provide drivers with necessary post-accident information, procedures and instructions, prior to the driver operating a commercial motor vehicle, so that drivers will be able to comply with the requirements of this section.

(e) The results of any tests for the use of alcohol performed by Federal, State, or local officials having independent authority to require a driver to submit to a test, shall be considered to meet the requirements of this section provided such tests conform to applicable Federal, State or local requirements, and that the results of the tests are obtained by the motor carrier.

§ 382.305 Random testing.

Option 1

(a) Each motor carrier shall, at various times, randomly select drivers for unannounced alcohol testing. The selection of drivers shall be made by use of a scientifically valid method, such as a random-number table or a computer-based random number generator that is matched with drivers' Social Security numbers, payroll identification numbers, or other comparable identifying numbers. Each driver shall have an equal chance of being tested under the selection process used.

(b) During each 12-month period following the start of random alcohol testing by the motor carrier, the motor carrier shall meet the following conditions:

(1) The dates for administering unannounced testing of randomly-selected drivers shall be spread reasonably throughout the 12-month period; and

(2) The number of drivers randomly selected for testing during the 12-month period shall equal an annual rate of not less than (10–50) percent of the total number of drivers subject to alcohol testing under this part or the alcohol misuse rule of another DOT agency. If the motor carrier conducts random testing through a consortium, the annual rate may be calculated for each individual motor carrier or for the total number of drivers and DOT covered employees subject to random testing by the consortium.

(c) A driver shall only be tested while the driver is performing safety-sensitive functions; just before the driver is to perform safety-sensitive functions; or just after the driver has ceased performing such functions.

(d) Each motor carrier shall require that each driver who is notified of selection for random testing proceeds to the testing site immediately. However, if the driver is performing a safety-sensitive function at the time of notification, the motor carrier shall instead ensure that the driver ceases to perform the safety-sensitive function and proceeds to the testing site as soon as possible.

Option 2

(a) Each motor carrier shall require its drivers to submit to an alcohol test when requested to do so by a Federal, State or local official who is carrying out the requirements of this section and part 350 of this chapter.

(b) A driver shall submit to an alcohol test when requested to do so by a Federal, State or local official who is carrying out the requirements of this section and part 350 of this chapter.

(c)(1) The number of random tests performed in the State shall equal (10 to 50) percent of the number of commercial driver's license (CDL) holders in the State as of July 1 each year or as of a certain date mutually agreed upon by the State and the FHWA.

(2) Random alcohol testing may be performed in conjunction with other driver and/or vehicle inspections performed under the authority of part 350 of this chapter at various locations and times, including but not limited to, weigh stations, roadside, terminal and other motor carrier fixed locations.

(3) Random alcohol testing must be administered in conformance with the requirements of this part and part 40 of this title.

(4) Random alcohol testing conducted by Federal, State or local officials required under this part and part 350 of this chapter shall be administered without regard to any probable cause standard found in State or local law. The consequences of such non-probable cause random alcohol testing shall be limited to those set forth in this part.

(5) Random alcohol testing conducted by Federal, State or local officials where probable cause is independently established without regard to administering random alcohol testing in accordance with this part or part 350 of this chapter shall be administered in accordance with State or local law and not in accordance with this part. The consequences of such probable cause random alcohol testing shall be determined pursuant to State or local law and if applicable, in accordance with § 383.51 of this chapter.

(6) A driver's refusal to be tested under this part when requested to do so by a Federal, State or local official, pursuant to part 350 of this chapter or compatible State or local authority, shall be deemed as tantamount to a 0.04 or greater alcohol concentration level under this part.

(7) Pursuant to this part and part 350 of this chapter, the State or local officials participating under this program shall input into SAFETYNET all required random alcohol testing data.

(8) A Federal, State or local official must provide written notification to the appropriate State of licensure within five working days of any alcohol concentration test result of 0.02 or greater.

§ 382.307 Reasonable suspicion testing.

(a) Each motor carrier shall require any driver to submit to an alcohol test,

when the motor carrier has reasonable suspicion to believe that the driver has violated the prohibitions in this part.

(b) The motor carrier's determination that reasonable suspicion exists to require the driver to undergo an alcohol test shall be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the driver. The required observations shall be made by a supervisor who is trained in detecting the symptoms of alcohol misuse. The supervisor who makes the determination that reasonable suspicion exists shall not conduct the breath alcohol test on that driver.

(c) Alcohol testing is authorized by this section only if the observations required by paragraph (b) are made during or just preceding the period of the work day that the covered driver is required to be in compliance with this part. A driver may be required to undergo reasonable suspicion testing for alcohol while the driver is performing safety-sensitive functions; just before the driver is to perform safety-sensitive functions; or just after the driver has ceased performing such functions.

§ 382.309 Return to duty testing.

Each motor carrier shall ensure that before a driver returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited by subpart B of this part, the driver shall undergo a return to duty alcohol test with a result indicating an alcohol concentration of less than 0.02.

§ 382.311 Follow-up testing.

Following a determination under § 382.605(b) that a driver is in need of assistance in resolving problems associated with alcohol misuse, each motor carrier shall ensure that the driver is subject to unannounced follow-up alcohol testing as directed by a substance abuse professional in accordance with the provisions of § 382.605(c)(2)(ii).

§ 382.313 [Reserved]

§ 382.315 Exceptions for testing performed by consortiums.

(a) Pre-employment/pre-duty testing and random testing need not be performed directly by the motor carrier provided that the motor carrier directs or approves such testing program of a contractor or previous motor carrier prior to using a driver participating in the program.

(b) A motor carrier who exercises paragraphs (a) of this section or § 382.301(b) shall contact the alcohol testing program in which the driver participates or participated and shall obtain the following information:

(1) Name and address of the program(s).

(2) Verification that the driver participates or participated in the program(s).

(3) Verification that the program(s) conform to part 40 of this title.

(4) Verification that the driver is qualified under the rules of this part, including that the driver has not refused to be tested for alcohol.

(5) The date the driver was last tested for alcohol.

(6) The results of any tests taken within the previous six months and any other violations of subpart B of this part.

(7) The results of any referrals to a substance abuse professional for all violations of subpart B of this part.

(c) The motor carrier shall retain the information required by this section as specified in § 382.401.

(d) A motor carrier who uses, but does not employ, such a driver more than once a year must assure itself once every six months that the driver participates in an alcohol testing program that meets the requirements of this part.

Subpart D—Handling Of Test Results, Record Retention and Confidentiality

§ 382.401 Retention of records.

(a) *General Requirement.* Each motor carrier shall maintain records of its alcohol misuse prevention program as provided in this section. The records shall be maintained in a secure location with controlled access.

(b) *Period of Retention.* Each motor carrier shall maintain the records in accordance with the following schedule:

(1) *Five years.* Records of driver alcohol test results with results indicating an alcohol concentration of 0.02 or greater, documentation of refusals to take required alcohol tests, calibration documentation, and driver evaluation and referrals shall be maintained for a minimum of five years.

(2) *Two years.* Records related to the collection process (except calibration of evidential breath testing devices) and training shall be maintained for a minimum of two years.

(3) *One year.* Records of negative test results (as defined in part 40 of this title) shall be maintained for a minimum of one year.

(c) *Types of records.* The following specific records shall be maintained.

(1) Records related to the collection process:

(i) Collection logbooks, if used;

(ii) Documents relating to the random selection process;

(iii) Calibration documentation for evidential breath testing devices;

(iv) Verification of breath alcohol technician training;

(v) Documents generated in connection with decisions to administer reasonable suspicion alcohol tests;

(vi) Documents generated in connection with decisions on post-accident tests;

(vii) Documents verifying existence of a medical explanation of the inability of a driver to provide adequate breath for testing; and

(viii) Consolidated annual reports as required by § 382.403.

(2) Records related to test results:

(i) The motor carrier's copy of the alcohol test form, including the results of the test;

(ii) Documents related to the refusal of any driver to submit to an alcohol test required by this part;

(iii) Documents presented by a driver to dispute the result of an alcohol test administered under this part.

(3) Records related to other violations of this part.

(4) Records related to evaluations:

(i) Records pertaining to a determination by a substance abuse professional concerning a driver's need for assistance, and

(ii) Records concerning a driver's compliance with recommendations of the substance abuse professional.

(5) Records related to education and training:

(i) Materials on alcohol misuse awareness, including a copy of the motor carrier's policy on alcohol misuse;

(ii) Documentation of compliance with the requirements of § 382.601;

(iii) Documentation of training provided to supervisors for the purpose of qualifying the supervisors to make a determination concerning the need for alcohol testing based on reasonable suspicion; and

(iv) Certification that any training conducted under this part complies with the requirements for such training.

§ 382.403 Reporting of results in a management information system.

(a) Each motor carrier shall submit to the Federal Highway Administration, when requested, an annual report covering the calendar year, summarizing the results of its alcohol misuse prevention program.

(b) Each motor carrier that is subject to more than one DOT agency alcohol rule shall identify each driver covered by the regulations of more than one DOT agency. The identification will be by the total number and category of covered function. Prior to conducting any alcohol test on a driver subject to the rules of more than one DOT agency,

the motor carrier shall determine which DOT agency rule or rules authorizes or requires the test. The test result information shall be directed to the appropriate DOT agency or agencies.

(c) Each motor carrier shall ensure the accuracy and timeliness of each report submitted by the motor carrier or a consortium.

(d) Each motor carrier notified shall submit the required annual reports no later than February 15 of each year. The report shall be submitted on the form specified by the FHWA. Each report shall contain:

(1) Number of drivers by employee category;

(2) Number of drivers subject to testing under the alcohol misuse rules of another DOT Agency, identified by each agency;

(3)(i) Number of initial tests by type of test and employee category; and

(ii) Number of confirmatory tests, by type of test and employee category

(4) Number of confirmatory alcohol tests indicating an alcohol concentration of 0.04 or greater, by type of test and employee category;

(5) Number of confirmatory alcohol tests indicating an alcohol concentration of 0.02 or greater but less than 0.04;

(6) Number of persons denied a position as a driver following a pre-employment/pre-duty alcohol test indicating an alcohol concentration of 0.04 or greater;

(7) Number of drivers with a confirmatory alcohol test indicating an alcohol concentration of 0.04 or greater who were returned to duty in driver positions (having complied with the recommendations of a substance abuse professional as described in §§ 382.503 and 382.605;)

(8) Number of drivers who were administered alcohol and drug tests at the same time, with both a positive drug test result and an alcohol test result indicating an alcohol concentration of 0.04 or greater;

(9) Number of drivers who were found to have violated other provisions of subpart B of this part, and the action taken in response to the violation;

(10) Number of drivers who refused to submit to an alcohol test required under this part, and the action taken in response to the refusal;

(11) Number of supervisors who have received training during the reporting period in determining the existence of reasonable suspicion of alcohol misuse.

§ 382.405 Access to facilities and records.

(a) Except as required by law or expressly authorized or required in this section, no motor carrier shall release driver information that is contained in records required to be maintained under § 382.401.

(b) A driver is entitled, upon written request, to obtain copies of any records pertaining to the driver's use of alcohol, including any records pertaining to his or her alcohol tests. The motor carrier shall promptly provide the records requested by the driver. Access to a driver's records shall not be contingent upon payment for records other than those specifically requested.

(c) A motor carrier shall permit access to all facilities utilized in complying with the requirements of this part to the Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the motor carrier or any of its drivers.

(d) Each motor carrier shall make available copies of all results for motor carrier alcohol testing conducted under this part and any other information pertaining to the motor carrier's alcohol misuse prevention program, when requested by the Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the motor carrier or any of its drivers.

(e) When requested by the National Transportation Safety Board as part of an accident investigation, motor carriers shall disclose information related to the motor carrier's administration of a post-accident alcohol test administered following the accident under investigation.

(f) Records shall be made available to a subsequent motor carrier upon receipt of a written request from the driver. Disclosure by the subsequent motor carrier is permitted only as expressly authorized by the terms of the driver's request.

(g) A motor carrier may disclose information required to be maintained under this part pertaining to a driver to the driver or the decisionmaker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the individual, and arising from the results of an alcohol test administered under this part, or from the motor carrier's determination that the driver engaged in conduct prohibited by subpart B of this part (including, but not limited to, a worker's compensation, unemployment compensation, or other proceeding relating to a benefit sought by the driver.)

(h) A motor carrier shall release information regarding a driver's records as directed by the specific, written consent of the driver authorizing release of the information to an identified person. Release of such information by the person receiving the information is permitted only in accordance with the terms of the driver's consent.

Subpart E—Consequences For Drivers Engaging in Alcohol-Related Conduct

§ 382.501 Removal from safety-sensitive function.

(a) Except as provided in subpart F of this part, no driver shall perform safety-sensitive functions if the driver has engaged in conduct prohibited by subpart B of this part or an alcohol rule of another DOT agency.

(b) No motor carrier shall permit any driver to perform safety-sensitive functions if the motor carrier has determined that the driver has violated this section.

§ 382.503 Required evaluation and testing.

No driver who has engaged in conduct prohibited by subpart B of this part shall perform safety-sensitive functions unless the driver has met the requirements of § 382.605. No motor carrier shall permit a driver to perform safety-sensitive functions unless the driver has met the requirements of § 382.605. Nothing in this section shall be construed to prohibit the continued performance of safety-sensitive functions necessary to respond to an emergency.

§ 382.505 Other alcohol-related conduct.

(a) No driver tested under the provisions of subpart C of this part who is found to have an alcohol concentration of 0.02 or greater but less than 0.04 shall perform or continue to perform safety-sensitive functions for a motor carrier, nor shall a motor carrier permit the driver to perform or continue to perform safety-sensitive functions, until the start of the driver's next regularly scheduled duty period, but not less than 24 hours following administration of the test.

(b) Except as provided in paragraph (a) of this section, no motor carrier shall take any action under this part against a driver based solely on test results showing an alcohol concentration less than 0.04. This does not prohibit an employer with authority independent of this part from taking any action otherwise consistent with law.

(c) Nothing in this section shall be construed to prohibit the continued performance of safety-sensitive functions necessary to respond to an emergency.

§ 382.507 Additional consequences for alcohol concentration violations.

(a)(1) *Discovered by a motor carrier.* A driver who is found through testing under this part to have an alcohol concentration of 0.04 or greater is

prohibited from driving for the periods specified in paragraph (a)(2) of this section.

(2) *Duration of prohibited driving periods:* (i) *Second violation.* A driver who, during any three-year period, is found to have an alcohol concentration of 0.04 or greater twice in separate incidents, is prohibited from driving any commercial motor vehicle, as defined in this part or part 390 of this subchapter, for a period of 60 consecutive days.

(ii) *Third and subsequent violations.* A driver who, during any three-year period, is found to have an alcohol concentration of 0.04 or greater three or more times in separate incidents, is prohibited from driving any commercial motor vehicle, as defined in this part or part 390 of this subchapter, for a period of 120 consecutive days.

(b)(1) *Discovered by a Federal, State or local government official.* A driver who is found to have an alcohol concentration of 0.02 or greater by a Federal, State or local official shall be placed out-of-service from driving any commercial motor vehicle, as defined in this part or part 390 of this subchapter, for a minimum period of 24 hours.

(2) A driver who is found to be in violation of § 382.201 twice within three years by a Federal, State or local official shall:

(i) Be placed out of service for a 24-hour period,

(ii) Be prohibited from driving any commercial motor vehicle, as defined in this part or part 390 of this chapter, for a period of 60 consecutive days commencing upon completion of the State's licensing review process, if any; and

(iii) Have his/her commercial driver's license suspended, revoked or canceled for at least 60 days upon completion of the State's licensing review process, if any.

(3) A driver who is found to be in violation of § 382.201 three or more times within three years by a Federal, State or local official shall:

(i) Be placed out of service for a 24-hour period,

(ii) Be prohibited from driving any commercial motor vehicle, as defined in this part or part 390 of this chapter, for a period of 120 consecutive days commencing upon completion of the State's licensing review process, if any; and

(iii) Have his/her commercial driver's license suspended, revoked or canceled for at least 120 days upon completion of the State's licensing review process, if any.

(c) *Out-of-service orders.* (1) Any driver who is issued an out-of-service order by a Federal, State or local official under this section shall report such issuance to his or her motor carrier within 24 hours.

(2) No driver shall violate the terms of an out-of-service order issued under this section.

(3) A driver shall be prohibited from driving a commercial motor vehicle, as defined in this part and in part 390 of this chapter, for not less than five consecutive days, if the driver fails to inform the motor carrier of the issuance of an out-of-service order as required by this section.

(4) Any driver who violates an out-of-service order under this part shall be prohibited from driving any commercial motor vehicle, as defined in this part or in part 390 of this chapter, and have his/her commercial driver's license suspended, revoked or canceled, upon completion of the State's licensing review process, if any:

(i) On a first offense for 90 days, and he/she shall be subject to a civil penalty of not less than $1,000, and

(ii) On any subsequent offense within three years of a previous offense, for not less than one year and not more than five years, and he/she shall be subject to a civil penalty of not less than $1,000.

(5) Any motor carrier that allows, permits, authorizes, requires, or otherwise knowingly uses a driver to operate a commercial motor vehicle in violation of an out-of-service order shall be subject to a civil penalty of not more than $10,000.

(6) Any motor carrier who is notified by a driver under paragraph (b)(1) of this section, or through other means has knowledge of the issuance of an out-of-service order to its driver, shall notify the State official which issued the commercial driver's license to the driver receiving the out-of-service order no later than five days of being notified or obtaining knowledge of the issuance of the order.

(d) A driver who refuses to be tested for alcohol under the provisions of this part shall not drive any commercial motor vehicle, as defined in this part or part 390 of this chapter, for a period of not less than one year.

(e) No motor carrier shall knowingly use a driver to drive any commercial motor vehicle, as defined in this part or part 390 of this chapter, during the prohibition periods specified under this section, when the driver is in violation of any of the requirements of this subpart. A motor carrier that knowingly uses a driver to violate this subpart shall be subject to the penalty provisions of 49 U.S.C. 521(b).

(f) No motor carrier shall knowingly use a driver who has been found to have violated any requirements of this part to drive any commercial motor vehicle, as defined in this part or in part 390 of this chapter, or perform any other safety-sensitive functions regulated by any DOT agency, until the driver has complied with the requirements of this part, including the completion of any evaluation, treatment, or return to duty testing required by the substance abuse professional, and any other applicable DOT agencies' regulations.

(g) A driver shall be prohibited from driving for a period of one year following an alcohol test indicating an alcohol concentration of 0.02 or greater when the driver has been involved in a fatal accident.

§ 382.509 Disqualifications.

(a) Nothing in this subpart shall be construed to restrict the authority of Federal, State or local officials from implementing § 383.51 of this chapter. A driver whose test under § 382.201 conducted by Federal, State or local officials which results in an alcohol concentration of 0.04 or greater, shall be subject to the disqualifications contained in § 383.51(b)(3) of this chapter.

(k) Notwithstanding the provisions of this part, the penalty provisions of § 391.15 of this chapter remain applicable within this part for actions taken by Federal Highway Administration officials.

Subpart F—Alcohol Misuse Information, Training, and Referral

§ 382.601 Motor carrier obligation to promulgate a policy on the misuse of alcohol.

(a) *General requirements.* Each motor carrier shall provide educational materials that explain the requirements of this part and the motor carrier's policies and procedures with respect to meeting those requirements. Each motor carrier shall provide written notice to every driver and to representatives of driver organizations of the availability of this information.

(b) *Required content.* The materials to be made available to drivers shall include detailed discussion of at least the following:

(1) The identity of the person designated by the motor carrier to answer driver questions about the materials;

(2) The categories of drivers who are subject to the provisions of this part;

(3) Sufficient information about the safety-sensitive functions performed by those drivers to make clear what period of the work day the driver is required to be in compliance with this part;

(4) Specific information concerning driver conduct that is prohibited by this part;

(5) The circumstances under which a driver will be tested for alcohol under this part;

(6) The procedures that will be used to test for the presence of alcohol, protect the driver and the integrity of the sample, safeguard the validity of the test results, and ensure that those results are attributed to the correct driver;

(7) The requirement that a driver submit to alcohol tests administered in accordance with this part;

(8) An explanation of what constitutes a refusal to submit to an alcohol test and the attendant consequences;

(9) The consequences for drivers found to have violated subpart B of this part, including the requirement that the driver be removed immediately from safety-sensitive functions, and the procedures under § 382.605; and

(10) The consequences for drivers found to have an alcohol concentration of 0.02 or greater but less than 0.04.

(c) *Optional provision.* The materials supplied to drivers may also include information on additional motor carrier policies with respect to the use or possession of alcohol, including any consequences for a driver found to have a specified alcohol level, that are based on the motor carrier's authority independent of this part. Any such additional policies or consequences must be clearly and obviously described as being based on independent authority.

§ 382.603 Training for supervisors.

Each motor carrier shall ensure that persons designated to determine whether reasonable suspicion exists to require a driver to undergo alcohol testing under § 382.307 receive at least 60 minutes of training on the physical, behavioral, speech, and performance indicators of probable alcohol misuse.

§ 382.605 Referral, evaluation, and treatment.

(a) Each driver who has engaged in conduct prohibited by subpart B of this part shall be advised by the motor carrier of the resources available to the driver in evaluating and resolving problems associated with the misuse of alcohol, including the names, addresses, and telephone numbers of substance abuse professionals and counselling and treatment programs.

(b) Each driver who engages in conduct prohibited under subpart B of this part shall be evaluated by a substance abuse professional who shall determine what assistance, if any, the employee needs in resolving problems associated with alcohol misuse.

(c)(1) Before a driver returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited by subpart B of this part, the driver shall undergo a return to duty alcohol test with a result indicating an alcohol concentration of less than 0.02.

(2) In addition, each driver identified as needing assistance in resolving problems associated with alcohol misuse —

(i) Shall be evaluated by a substance abuse professional to determine that the driver has properly followed the rehabilitation program prescribed under paragraph (b) of this section, and

(ii) Shall be subject to unannounced follow-up alcohol tests administered by the motor carrier following the driver's return to duty. The number and frequency of such follow-up testing shall be determined by a substance abuse professional, but shall consist of at least six tests in the first 12 months following the driver's return to duty. Follow-up testing shall not exceed 60 months from the date of the driver's return to duty. The substance abuse professional may terminate the requirement for follow-up testing at any time after the first six tests have been administered, if the substance abuse professional determines that such testing is no longer necessary.

(d) Evaluation and rehabilitation may be provided by the motor carrier, by a substance abuse professional under contract with the motor carrier, or by a substance abuse professional not affiliated with the motor carrier. The choice of substance abuse professional and assignment of costs shall be made in accordance with motor carrier/driver agreements and motor carrier policies.

(e) The requirements of this section with respect to referral, evaluation and rehabilitation do not apply to applicants who refuse to submit to a pre-employment/pre-duty alcohol test or who have a pre-employment/pre-duty alcohol test with a result indicating an alcohol concentration of 0.04 or greater.

PART 383—COMMERCIAL DRIVER'S LICENSE STANDARDS; REQUIREMENTS AND PENALTIES

5. The authority citation for part 383 continues to read as follows:

Authority: Title XII of Pub. L. 99–570, 100 Stat. 3207–170; 49 U.S.C. 3102; 49 U.S.C. App. 2505; 49 CFR 1.48.

6. Section 383.5 is amended by revising the definition of *serious traffic violation* to read as follows.

§ 383.5 Definitions.

* * * * *

Serious traffic violation means conviction, when operating a commercial motor vehicle, of:

(1) Excessive speeding, involving any single offense for any speed of 15 miles per hour or more above the posted speed limit;

(2) Reckless driving, as defined by State or local law or regulation, including but not limited to offenses of driving a commercial motor vehicle in willful or wanton disregard for the safety of persons or property;

(3) Improper or erratic traffic lane changes;

(4) Following the vehicle ahead too closely;

(5) Testing under Part 382 which results in:

(i) A verified positive controlled substances test, *Option 1* (ii) An alcohol concentration of 0.04 or greater, *Option 2* (ii) An alcohol concentration of 0.02 or greater; or

(6) A violation, arising in connection with a fatal accident, of State or local law relating to motor vehicle traffic control (other than a parking violation). (Serious traffic violations exclude vehicle weight and defect violations.)

* * * * *

7. Section 383.72 is revised to read as follows:

§ 383.72 Implied consent to alcohol testing.

Any person who holds a CDL shall be deemed to have consented to such testing as is required of him/her by any State or jurisdiction in the enforcement of part 382 of this chapter, § 383.51(b)(2)(i) and § 392.5(a)(2). Consent is implied by driving a commercial motor vehicle.

PART 392—DRIVING OF MOTOR VEHICLES

8. The authority citation for part 392 continues to read as follows:

Authority: 49 App. U.S.C. App. 2505; 49 U.S.C. 3102; 49 CFR 1.48.

9. Section 392.5 is amended by revising the title of the section, paragraphs (a) and (b)(2) to read as follows:

§ 392.5 Alcohol prohibition.

(a) No driver shall—

(1) Use alcohol or be under the influence of alcohol, within 4 hours before going on duty or operating, or having physical control of, a commercial motor vehicle; or

(2) Use alcohol, be under the influence of alcohol, or have any measured alcohol concentration or detected presence of alcohol, while on duty, or operating, or in physical control of a commercial motor vehicle; or

(3) Be on duty or operate a commercial motor vehicle while the driver possesses an alcoholic beverage. However, this does not apply to possession of alcohol which is manifested and transported as part of a shipment.

(b) * * *

(2) Be on duty or operate a commercial motor vehicle if, by the driver's general appearance or conduct or by other substantiating evidence, the driver appears to have used alcohol within the preceding four hours.

* * * * *

PART 395—HOURS OF SERVICE OF DRIVERS

10. The authority citation for part 395 continues to read as follows:

Authority: 49 U.S.C. 3102; 49 U.S.C. App. 2505; and 49 CFR 1.48.

11. Section 395.2 is amended by adding a new paragraph (10) to the definition of *On-Duty time* to read as follows:

§ 395.2 Definitions.

* * * * *

On-Duty Time

* * * * *

(10) All time providing a breath or urine sample in order to comply with random, reasonable suspicion, post-accident or follow-up testing required by part 382 of this chapter when directed by a motor carrier.

* * * * *

[FR Doc. 92-29678 Filed 12-10-92; 10:00 am]

BILLING CODE 4910-22-M

Federal Highway Administration

49 CFR Part 382

[FHWA Docket No. MC-93-3]

RIN 2125-AD11

Controlled Substances and Alcohol Use and Testing; Foreign-Based Motor Carriers and Drivers

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Advance notice of proposed rulemaking (ANPRM).

SUMMARY: The FHWA is requesting comments on the applicability of alcohol and controlled substances testing requirements for foreign-based drivers of motor carriers under the Omnibus Transportation Employee Testing Act of 1991. This action is taken in conjunction with the notices of proposed rulemakings published elsewhere in today's **Federal Register** on alcohol and controlled substances testing and involves current FHWA regulations requiring controlled substances testing.

The overall goal of alcohol and controlled substances testing is to ensure that drivers who misuse alcohol and/or controlled substances do not operate a commercial motor vehicle, thereby reducing accidents, injuries and fatalities on highways nationwide.

DATES: Written, signed comments must be received on or before February 16, 1993.

ADDRESSES: Submit written, signed comments to FHWA Docket No. MC-93-3, room 4232, Office of the Chief Counsel, 400 Seventh Street, SW., Washington, DC 20590. All comments received will be available for examination at the above address from 8:30 a.m. to 3:30 p.m., e.t., Monday through Friday, except Federal legal holidays.

FOR FURTHER INFORMATION CONTACT: Mr. David Miller, Office of Motor Carrier Standards, (202) 366-2981, or Mr. David Sett, Office of the Chief Counsel, (202) 366-0834, Federal Highway Administration, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except legal Federal holidays.

The public is urged to obtain information through the Department of Transportation's Anti-Drug Information Center (ADIC) system. The public may access the system by dialing (800) 225-3784 using a touch tone telephone. Access to a computer system may also be made using a personal computer connected via modem on (800) 225-3804. A user fee will be charged for certain services provided by the system.

SUPPLEMENTARY INFORMATION:

I. Background

On November 21, 1988, the FHWA, along with certain other agencies of the Department of Transportation (the Department), adopted regulations requiring pre-employment/use, periodic, post-accident, reasonable cause and random drug testing of commercial motor vehicle drivers of motor carriers. On its face, the FHWA rule applies to all covered drivers while operating in the United States, regardless of whether they are based in a foreign country or the United States The rule provided, however, that it would not apply to any person for whom compliance would violate the domestic laws or policies of another country. The rule as originally published further provided that in any event it would not be effective until January 1, 1990, with respect to any person for whom a foreign government contends that application of the rules raises questions of compatibility with that country's laws or policies. See 53 FR 47134.

On September 27, 1989, the FHWA delayed the effective date of drug testing requirements for foreign-based employees of foreign-based motor carriers to January 1, 1991. See 54 FR 39546.

In a December 27, 1989, revision to the drug testing rule, the effective date was again delayed, until January 2, 1992, with respect to any foreign-based employee of a foreign-domiciled carrier. See 54 FR 53294. Further delays were published on April 24, 1991 (56 FR 18994), and July 14, 1992 (57 FR 31277), currently making the rule applicable to foreign-based employees of foreign-domiciled carriers on January 2, 1995. This date is also applicable to persons covered by similar rules issued by other DOT agencies.

The Department and other elements of the U.S. Government have entered into discussions with foreign governments to attempt to resolve any conflict between our current drug rules and foreign government laws or policies. The FHWA has allowed additional time to permit the Department to try to achieve our goal of a drug-free transportation system while respecting the national sovereignty of other countries. Drug testing is a part of the FHWA's continuing multilateral discussions with Canada and Mexico aimed at making the regulations governing commercial motor vehicle operations compatible in those countries.

Meanwhile, as mandated by the Omnibus Transportation Employee Testing Act of 1991, the FHWA has published elsewhere in today's **Federal Register** separate NPRM's on controlled substances and alcohol misuse. Omnibus Transportation Employee Testing Act of 1991, Public Law 102-143, title V, sec. 5, 105 Stat. 917 (the Act). The new rules would replace the current drug testing rule and would institute alcohol testing. In recognition of the ongoing discussions on foreign applicability, and to avoid the possibility of making numerous delaying revisions such as were necessitated with the current drug rule, the proposed rules expressly exclude foreign-based drivers and motor carriers. The issue is being considered instead in this advance notice of proposed rulemaking, and may ultimately be incorporated in the final rules on

controlled substances and alcohol misuse.

II. The Department's and FHWA's Legal Authority for Foreign Employer Testing Programs

The Act provides for coverage by the Department's drug and alcohol testing rules of activities in the U. S. of foreign employers. The relevant provisions of the Act for the aviation industry provide that FAA regulations shall establish a program which requires air carriers *and foreign air carriers* to conduct pre-employment, reasonable suspicion, random, and post accident testing for use, in violation of law or Federal regulation, of alcohol or a controlled substance. (Sec. 3 of the Act, amending sec. 614(a)(1) of the Federal Aviation Act (emphasis added)). Further, the Act provides that in prescribing regulations under this section, the FAA Administrator shall only establish requirements applicable to foreign air carriers that are consistent with the international obligations of the United States, and the Administrator shall take into consideration any applicable laws and regulations of foreign countries. (Sec. 3 of the Act, amending sec. 614(e)(3) of the Federal Aviation Act.) The portion of the Act affecting the railroad industry contains similar language that provides that FRA regulations shall establish a program which requires *railroads* to conduct pre-employment, reasonable suspicion, random, and post-accident testing of all railroad employees responsible for safety sensitive functions for use, in violation of law or Federal regulation, of alcohol or a controlled substance. (Sec. 4 of the Act, amending sec. 202(r)(1) of the Federal Railroad Safety Act of 1970 (emphasis added).) In carrying out the provisions of this subsection, the Secretary shall only establish requirements that are consistent with the international obligations of the United States, and the Secretary shall take into consideration any applicable laws and regulations of foreign countries. (Sec. 4 of the Act, amending § 202(r)(1) of the Federal Railroad Safety Act of 1970.) The portion of the Act affecting the motor carrier industry also includes language of this kind that provides that FHWA regulations shall establish a program which requires *motor carriers* to conduct pre-employment, reasonable suspicion, random, and post-accident testing of the operators of commercial motor vehicles for use, in violation of law of Federal regulation, of alcohol or a controlled substance. (Sec. 5(a)(1) of the Act, creating sec. 12020(a) of the Commercial Motor Vehicle Safety Act of 1986 (emphasis added).) In issuing regulations under this section, the Secretary shall only establish requirements that are consistent with the international obligations of the United States, and the Secretary shall take into consideration any applicable laws and regulations of foreign countries. (Sec. 5(a)(1) of the Act, creating sec. 12020(e)(3) of the Commercial Motor Vehicle Safety Act of 1986.) There are no similar provisions applicable to the transit industry, since the Federal Transit Administration drug and alcohol testing provisions do not cover foreign employers.

Under these similar provisions, FAA, FRA and FHWA have the authority and obligation to require drug and alcohol tests for safety sensitive employees of foreign employers. The FAA provisions specifically extend coverage to "foreign air carriers," and the FHWA and FRA provisions cover "motor carriers" and "railroads," respectively, which definitions include employers based in this country or in a foreign country. Moreover, the legal authority extends to all kinds of testing required by the Act: reasonable suspicion, post-accident, pre-employment, and random (subject to U.S. international obligations).

It is the Department's and the FHWA's policy to carry out the Act's requirements using a territorial jurisdiction approach. That is, the Department interprets its statutory authority and obligation for drug and alcohol testing to apply to foreign employers who conduct operations in the United States, with respect to those operations. This does not mean that all operations of such a transportation employer would be subject to the rules. For example, a foreign employer's operations within its own country would not be subject to these rules. Following the same policy, only those employees of a foreign transportation employer who perform safety-sensitive functions in operations within the U.S. would be subject to testing.

For each of the three industries involved, the Act requires the Department and the FHWA to act consistent with the international obligations of the U.S., and to take foreign countries' laws and regulations into account. (This could be relevant, for example, to the conduct of testing in some foreign countries.) The Department and the FHWA are sensitive to the concerns of foreign countries. We are also very much aware of a number of practical considerations that may arise as we implement the Act with respect to foreign employers. For these reasons, as well as to foster consistency in the implementation of very similar statutory provisions, the FRA, FHWA, and FAA are issuing advance notices of proposed rulemaking (ANPRMs) rather than notices of proposed rulemaking (NPRMs). We are seeking the public's views on a variety of issues and questions that may arise with respect to drug and alcohol testing by foreign employers.

III. General Problems and Issues

The following problems, questions, and issues appear to arise in the aviation, railroad, and motor carrier contexts. In responding to these questions and requests for comment, we ask that commenters distinguish responses relating to alcohol testing from those relating to drug testing, where the same response is not appropriate for both.

1. International Treaties and Foreign Laws

We seek information on any bilateral or multilateral treaty obligations of the U.S., or principles of international law, that may affect our implementation of the Act. If there are any international agreements under development that would affect drug and alcohol testing of foreign employers, we also seek information on them. In commenting on international obligations of the U.S., we request that commenters focus on any provisions that affect the ability of the United States to test employees conducting operations in the U.S., with the testing to take place in the United States.

In addition to international obligations, we seek comment on any laws or regulations of foreign countries that we should take into account in implementing the Act. We would like to obtain information on any laws or rules of specific foreign countries whose employers conduct U.S. operations that we should consider.

2. Pre-employment and Follow-Up Testing

Often, employees of foreign transportation employers are recruited and hired in the foreign country involved. For example, a Canadian employer may hire Canadian nationals in Canada, some of whom will subsequently conduct operations in the United States. The employer may not know, at the time of hire, which of its employees will operate in the U.S. In such a situation, should the employer be required to conduct pre-employment testing? If so, how, when and where would the foreign employer conduct pre-employment testing of the employees who were to operate in the U.S.?

Should all pre-employment testing be conducted in the U.S., or should the rules permit the employer to conduct tests in its own country? Where the employer could not, because of legal restraints on testing in its own country, conduct testing there, could the testing be arranged in the United States? For example, should the employer send the employee to a point in the United States for a test before the employee actually conducts an operation in this country? Should pre-employment testing be required at all in such a situation?

If an employee tests positive on any type of alcohol or drug test, the Department's existing and proposed rules require a return-to-duty test and follow-up tests, over a period of time. For an employee whose domicile, station, terminal, or reporting point, as applicable, is in a foreign country, and who comes into the U.S. occasionally, questions similar to those mentioned above for pre-employment testing may arise. If the employer does not conduct the tests in its own country, how does the employer arrange for the required tests to take place in the U.S.?

3. Random Testing

Should all of a foreign employer's covered employees who operate in the U.S. at any time have to be part of the random testing pool? How would foreign employers arrange for the unannounced, random testing of their employees in U.S. territory? In their own countries? Also, to meet random testing rate requirements, employers have to conduct a certain number of tests per year (e.g., under a 50 percent random testing rate, a number of tests each year equivalent to half the number of the employees in the random pool). Would it be practical for employers to meet this requirement, while maintaining randomness, if tests are conducted only in the U.S.? Are there circumstances in which foreign employers should not be subject to a random testing requirement?

4. Requirement for All Types of Tests

Should the Department refrain from requiring foreign employers to conduct certain kinds of tests? The Department anticipates little problem with requiring a post-accident or reasonable suspicion test in the U.S., following an accident or basis for reasonable suspicion that occurred in this country. However, as discussed above, there may be greater problems with other forms of testing. Is it desirable to exclude foreign employers from some or all types of alcohol or drug testing? Why or why not? Should the legal authority of the employer to conduct a certain kind of testing in its own country be considered in deciding whether to exclude employers in a certain country from a requirement? If some exclusions are desirable, how can this objective be reconciled with the testing requirements of the Act?

5. Other Compliance Activities

DOT drug and alcohol rules have a variety of other program requirements in addition to testing. These requirements pertain to employee assistance and training programs, substance abuse professionals, record retention and reporting, and many other subjects. Some of these activities or functions might well take place most conveniently in the foreign employer's country. Should some or all of the foreign employer's program activities be required or permitted to take place outside the U.S.? How would the Department monitor or enforce compliance with drug or alcohol program activities that take place outside the U.S.? How and where would Departmental personnel obtain access to information about the employers' implementation of program and testing requirements?

6. Testing Procedures

49 CFR part 40 governs testing under the DOT drug and alcohol testing rules of the three operating administrations involved (except for FRA post-accident testing). Part 40 compliance could raise a number of problems if any testing or collection is performed abroad. Some of these issues may apply even with respect to testing by foreign employers that occurs in the U.S. Some examples follow.

Drug testing under part 40 includes testing specimens at National Institute on Drug Abuse (NIDA)-certified laboratories, all of which are in the U.S. If specimen collection for drug testing is done outside the U.S., specimens would probably be sent to these laboratories for analysis. What practical problems does this create (e.g., timeliness of transmission of specimens and associated paperwork), and how could they be solved? If drug specimen collection or alcohol testing is permitted to be conducted outside the U.S., what language or training problems would need to be overcome, and what is the best way of dealing with these problems (e.g., translations of DOT requirements or forms)? In drug testing, there is a requirement for medical review officers (MROs) to verify positive tests and perform other functions. Should MROs (who, under current rules, must be physicians licensed in the U.S.) have to perform these functions, or should physicians licensed in the foreign countries involved be able to participate as well? The same question can be asked for substance abuse professionals who would evaluate people who test positive for alcohol and drugs. If personnel licensed in the U.S. were required for this function, would this create difficult logistical problems for the program? Would there be problems in obtaining or using evidential breath testing devices (EBTs) on the National Highway Traffic Safety Administration's Conforming Products List (which part 40 requires for alcohol testing) in other countries, if testing is permitted to be conducted outside the U.S.?

Should there be a method of accepting a foreign country's testing procedures in lieu of some or all of part 40 procedures, if testing is permitted to be conducted in foreign countries? The Department seeks comment on any other part 40-related problems that may occur in the context of testing of foreign operators.

7. Consequences of Positive Tests

The consequence of a "positive" test is removal from a safety-sensitive position, until the employee follows the rule's procedures for reinstatement in the safety sensitive position. However, the application of the DOT drug and alcohol testing rules to foreign employers is intended only to affect U.S. operations. Consequently, the Department would not assert jurisdiction to require that an employee of a foreign employer who tested positive not perform safety-sensitive functions in operations outside the United States. However, such an employee would be prohibited from conducting any safety-sensitive functions in the U.S., until the employee follows the rule's procedures for reinstatement in the safety sensitive position. How would foreign employers make sure that an employee who tested positive did not engage in operations in the U.S., until reinstatement requirements had been met? How would the Department monitor compliance with this requirement?

8. Costs

What is the number of employees who would be affected by a requirement to test persons performing safety-sensitive functions in the U.S. for foreign employers? Do commenters anticipate that foreign operators' positive test rates (which can affect costs significantly) be higher, lower, or about the same as the positive test rates of U.S. employers for the employees who would be subject to these rules? Are there costs unique to drug and alcohol program activities that may occur outside the U.S. that the

Department should consider in estimating the costs of the rule? Are there any positive or negative trade or competitive effects of testing (or not testing) employees of foreign employers, for either U.S. or foreign companies?

IV. Rulemaking Analyses and Notices

The FHWA requests comments on whether to require foreign-based employees of foreign-domiciled motor carriers to be tested for the use of controlled substances and alcohol. The FHWA believes there is good cause to promulgate an amendment with advance notice and opportunity to comment. The FHWA has prepared a regulatory evaluation for FHWA Docket Nos. MC–92–19 and MC–92–23 in which the FHWA figured the cost of testing foreign operators of commercial motor vehicles. Those evaluations, although not specifically broken apart for foreign based drivers, does include this group of drivers and should be referred to for costs associated with this rulemaking. The FHWA does not have any knowledge about how many foreign based drivers would be subject to this rulemaking.

Executive Order 12291 (Federal Regulation) and DOT Regulatory Policies and Procedures

The FHWA has determined that this document does not contain a major rule under Executive Order 12291. However, the FHWA considers this document to be significant because of public interest in the drug and alcohol testing programs and the international impact of this document.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (5 U.S.C. 601–612), the FHWA has evaluated the effects of this rule on small entities, however the FHWA does not believe that we can make a full assessment of whether this rulemaking will have an adverse economic impact on small entities at this time. The FHWA does not know how many small entities would be subject to this action. It should be noted, however, the Omnibus Act mandates alcohol and controlled substances testing irrespective of the size of the entities.

For these reasons, the FHWA cannot certify that this action will or will not have a significant economic impact on a substantial number of small entities.

Executive Order 12612 (Federalism Assessment)

This action has not been analyzed in accordance with the principles and criteria contained in Executive Order 12612. The FHWA requests comments on whether this rule will have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.217, Motor Carrier Safety. The regulations implementing Executive Order 12372 regarding intergovernmental consultation of Federal programs and activities apply to this program.

Paperwork Reduction Act

The FHWA has not determined the impact this rulemaking would have on the collection of information requirements for purposes of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501–3520.

National Environmental Policy Act

The agency has analyzed this action for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and has determined that this action would not have any effect on the quality of the environment.

Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects in 49 CFR Part 382

Controlled substances testing, Alcohol testing, Highway safety, Highways and roads, Motor carriers, Motor vehicle safety.

Authority: 23 U.S.C. 315; 23 CFR 1.48.

Issued on: December 2, 1992.

Thomas D. Larson,

Administrator.

Andrew H. Card,

Secretary.

[FR Doc. 92–29679 Filed 12–10–92; 10:00 am]

BILLING CODE 4910–22–M

49 CFR Part 391

[FHWA Docket No. MC–93–2]

RIN 2125–AC81

Qualifications of Drivers; Controlled Substances Testing; Recordkeeping and Reporting Requirements

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: The FHWA is proposing to amend its controlled substances testing requirements. This proposal revises the recordkeeping and reporting requirements to be consistent with an NPRM also being published in today's **Federal Register** by the Department of Transportation, Office of the Secretary, regarding the collection and reporting of drug testing data and would implement the proposed DOT system. Together, the two NPRM's would require motor carriers subject to the drug testing requirements to maintain specific information and report annually to the FHWA, if requested to do so, certain information about their drug testing programs. A representative sample of motor carriers would be randomly selected to submit the data. The random selection would generate sufficient data to produce statistically valid results. The FHWA would use the data to analyze its current approach to deter and detect illegal drug use within the motor carrier industry and, as appropriate, plan a more efficient and effective means to attain program goals.

DATES: Written, signed comments on these proposals must be received on or before April 14, 1993.

ADDRESSES: Submit written, signed comments to FHWA Docket No. MC–93–2, room 4232, HCC–10, Office of the Chief Counsel, Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590. All comments received will be available for examination at the above address from 8:30 a.m. to 3:30 p.m., e.t., Monday through Friday, except legal Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard.

FOR FURTHER INFORMATION CONTACT: *For information regarding program issues:* Mr. David Miller, Office of Motor Carrier Standards, (202) 366–2981, Federal Highway Administration, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. *For information regarding legal issues:* Mr. David Sett, Office of Chief Counsel, (202) 366–0834, Federal Highway Administration, Department of

Transportation, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except legal Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

The FHWA published in the **Federal Register** a final rule on November 21, 1988, setting forth regulations to require motor carriers who operate commercial motor vehicles in interstate commerce to have an anti-drug program, including testing of commercial motor vehicle drivers for the use of controlled substances (53 FR 47134). Testing under this rule must be conducted prior to employment/use, periodically, upon reasonable cause, after certain reportable accidents, and randomly. Generally, interstate drivers of commercial motor vehicles with gross vehicle weight ratings (GVWR) of more than 26,000 pounds, vehicles transporting hazardous materials which are required to be placarded, or vehicles designed to transport more than 15 passengers, including the driver, are subject to this rule.

On the same date, November 21, 1988, the U.S. Department of Transportation, Office of the Secretary (Department), published an interim final rule, "Procedures for Transportation Workplace Drug Testing Programs" (53 FR 47002). On December 1, 1989, the Department published a final rule amending certain portions of the November 21, 1988, interim final rule. (54 FR 49854).

On November 6, 1989, the FHWA published a final rule clarifying the types of testing that must be implemented by December 21, 1989 (54 FR 46616). This **Federal Register** publication also deferred implementation of the random and mandatory post-accident testing requirements pending resolution of a lawsuit in which a preliminary injunction was imposed on such tests.

On February 1, 1990, the FHWA published an interim final rule (55 FR 3546) amending the requirements for pre-employment/pre-use and post accident testing. This interim final rule also included interpretations and clarifications of the November 21, 1988, final rule.

On April 26, 1991, the Ninth Circuit Court of Appeals upheld the FHWA drug testing regulations in their entirety *International Brotherhood of Teamsters, Chauffeurs, et al.* v. *Department of Transportation*, 932 F.2d 1292 (9th Cir. 1991). The FHWA published a final rule on August 16, 1991, providing an implementation schedule for random and mandatory post-accident testing. (56 FR 40806).

Proposed Recordkeeping and Reporting Requirements

Section 391.87, Notification of test results and recordkeeping, requires motor carries to maintain:

(1) All records related to the administration and results of the drug testing program;

(2) Certain information in the driver's qualification file; and

(3) Certain summary information on a calendar year basis.

In addition, § 391.87 prescribes procedures for the communication of drug test results among the medical review officer (MRO), the driver, the motor carrier and others once the results have been received by the MRO from the testing laboratory.

In the course of administering the anti-drug rule, the FHWA has received numerous inquiries regarding the clarification of these procedures. Interested individuals have generally expressed their concern about the paperwork burden associated with the controlled substances testing regulations. The following discussion should clarify most of the concerns that have been voiced.

The FHWA controlled substances testing requirements, and by reference the Department's rule, established minimum paperwork requirements. The documentation is needed to minimize the improper identification of urine specimens, ensure that the correct information is transmitted to the proper individuals and ensure compliance with the requirements. The custody and control form (see 49 CFR part 40, appendix A) provides for positive tracking of the identification of the urine specimen from the point of collection, through the laboratory performing the analysis, to the MRO. The collection site personnel are required to send a copy of the form to the motor carrier. The MRO receives two copies (one from the collection site personnel and one from the laboratory with the test results). In those cases where the result is positive, the MRO verifies or reverses laboratory results through contact with the donor and then transmits his/her findings to the motor carrier. The motor carrier is required to maintain the information it receives from the MRO in the driver's qualification file and maintain an annual summary of that and other information. The Department's proposed § 40.41, Reporting and review of results, would establish a standard DOT-wide Management Information System (MIS) and require that such standardized annual reports be submitted as specified by the appropriate Operating Administration (OA). With regard to controlled substances testing within the motor carrier industry, the FHWA is the appropriate OA. The following proposal is in concert with the Department's NPRM.

The FHWA proposes to revise 49 CFR 391.87(h) to require motor carriers to maintain the following information on an annual (calendar year) basis for drug testing:

1. Number of drivers by employee category. This data is necessary to assess the scope of the rule's application and provide a basis for determining if random testing meets the required 50 percent level.

2. Number of drivers subject to testing under the anti-drug rules of more than one DOT Agency, identified by each agency. This data is necessary to review multi-modal implementation so that policy can be designed accordingly.

3. Number of specimens collected by type of test (e.g., pre-employment, periodic, random, etc.) and employee category. This data is needed to check compliance with the rules by category and to review collection, testing and the review process.

4. Number of positives verified by a Medical Review Officer (MRO) by type of test, type of drug and employee category. This data, along with the number of tests performed, permits the calculation of positive rates necessary to determine the extent and type of drug use. Further, analysis of this data over time will provide a measure of the effectiveness of the drug testing rules in deterring drug use.

5. Number of negatives verified by a MRO by type of test, and employee category. This data is needed to check compliance with the rules and to review the application of the components of the program.

6. Number of persons denied a position as a driver following a verified positive controlled substances test. This data provides an assessment of whether the testing program is being implemented as required, provides a measure of the impact of the drug testing rules on the motor carrier industry, and yields information on the prevalence of drug use in the applicant pool.

7. Number of drivers verified positive by a MRO, who were returned to duty in driving positions during the reporting period. This data provides information on employer policy implementation regarding reentry requirements and rehabilitation of identified drug users.

8. Number of drivers with tests verified positive by a MRO for multiple drugs. This data provides information on the extent of multiple drug use within the motor carrier industry.

9. Number of drivers who refused to submit to a controlled substances test required under this part, and the action taken in response to the refusal(s). This data provides information on employer policy implementation regarding refusals and subsequent employer actions.

10. Number of drivers and supervisors who have received required training during the reporting period. This data provides information on training provided during the current reporting period and a cumulative count of drivers and supervisory personnel on the payroll as of each December 31 who receive the required drug training.

Section 391.87 currently requires motor carriers to maintain much of the same information contained in this proposal. In complying with the proposed rule, motor carriers or their MROs would not be required to perform any computations more complex than simple arithmetic. The information the FHWA is proposing motor carriers to develop, retain, and possibly submit is available to motor carriers from their respective laboratories, MROs and their own personnel files.

The FHWA proposes, in another NPRM published in today's **Federal Register**, to include alcohol testing to the MIS requirements. The FHWA is proposing the alcohol testing form in this document as well. Motor carriers would be required to maintain the following information on an annual (calendar year) basis for alcohol testing:

1. Number of covered employees by employee category. This data is necessary to assess the scope of the rule's application and provide a basis for determining if random testing meets the required (10 to 50 percent) level.

2. Number of covered employees subject to testing under the alcohol misuse rule of another DOT agency, identified by each agency. This data is necessary to review multi-modal implementation so that policy can be designed accordingly.

3. (i) Number of initial tests by type of test and employee category. (ii) Number of confirmatory tests, by type of test and employee category. This data is needed to check the compliance with the rules by category and to review collection and testing process.

4. Number of confirmatory alcohol tests indicating an alcohol concentration of .04 or greater, by type of test and employee category. This data is needed to check the compliance with the rules by category and to review collection and testing process.

5. Number of confirmatory alcohol tests indicating an alcohol concentration of .02 or greater but less than .04. This data is needed to check the compliance with the rules by category and to review collection and testing process.

6. Number of persons denied a position as a covered employee following a preemployment/pre-duty alcohol test indicating an alcohol concentration of .04 or greater. This data provides an assessment of whether the testing program is being implemented as required, provides a measure of the impact of the drug testing rules on the industries, and yields information on the prevalence of drug use in the applicant pool.

7. Number of covered employees with a confirmatory alcohol test indicating an alcohol concentration of .04 or greater who were returned to duty in covered positions (having complied with the recommendations of a substance abuse professional as described in DOT agency regulations). This data provides information on policy implementation regarding reentry requirements and rehabilitation of identified alcohol misusers.

8. Number of covered employees who were administered alcohol and drug tests at the same time, with both a positive and drug test result and an alcohol test result indicating an alcohol concentration of .04 or greater. This data provides information on the extent of multiple drug and alcohol use in the regulated industries.

9. Number of covered employees who were found to have violated other provisions of DOT agency regulations, and the action taken in response to the violation. This data provides information on whether drivers that are also pilots, pipeline inspectors, maintenance of way inspectors, etc. have had prior violations of similar regulations and the outcome of each violation.

10. Number of covered employees who refused to submit to an alcohol test required under this part, and the actions taken in response to the refusal. This data provides information on employer policy implementation regarding refusals and subsequent employer actions.

11. Number of supervisors who have received training during the reporting period in determining the existence of reasonable suspicion of alcohol misuse. This data provides information on training provided during the current reporting period and a cumulative count of covered employees and supervisory personnel on payroll as of December 31 who have received the required alcohol training.

The Department is proposing a standard format for use by motor carriers and other regulated entities for submission of the data. The FHWA believes that such forms will facilitate recordkeeping and data submission. Copies of the forms are included as an appendix to this NPRM and would be included as appendix H to 49 CFR chapter III, subchapter B. Included with the forms in the appendix are descriptions of each data element and instructions for submitting the required information. Commenters should review the appendix for a complete description of each data element.

The FHWA anticipates that motor carriers will be using third parties such as consortia, driver leasing companies, other motor carriers, unions, to perform much of the drug testing required under this rule. Also, a significant number of drivers will be used by motor carriers availing themselves of the exception to the pre-employment/use drug test provided in the current rule. Regardless, it should be noted that the motor carrier is still responsible for ensuring that a driver has been tested and the results of the test are included in the driver's qualification file as required by 49 CFR part 391, subpart H. Suppose a driver was a member of a consortium while working for two interstate motor carriers and both motor carriers were satisfied that the consortium was performing its work in accordance with the requirements of the controlled substances testing regulations (49 CFR part 391, subpart H and 49 CFR part 40). Both motor carriers would still be responsible for ensuring that required tests were performed and the results were retained by each motor carrier. The fact that a motor carrier does not perform the actual testing would not relieve the motor carrier of the responsibility to retain the information as specified in the rule.

Motor carriers who have chosen to use third parties to perform the drug testing requirements would also be responsible for submission of the information when requested. Information submitted by a third party on behalf of a motor carrier would have to clearly identify that the data being submitted is attributable to the specific motor carrier.

For those employers with some employees subject to the controlled substances and alcohol testing requirements of one DOT OA, and some employees subject to the requirements of another OA, a separate report must be retained for each OA. Each report must

include information pertinent only to that OA's requirements.

In those cases where an employee would be subject to the controlled substances and alcohol testing requirements of two or more DOT OA's, the results of each test performed would be attributed, for MIS purposes, to only one of the OAs' drug or alcohol testing rules, as determined by the motor carrier. For example, an employee drives a commercial motor vehicle for an employer which services pipelines, and is subject to requirements of both the FHWA and the Research and Special Programs Administration (RSPA). The employer must choose under which OA's reporting rules the employee will be covered. All employees with the same functions must be covered under the same OA's rules. If the employer chooses to cover the employee in the report required by RSPA, it should not include the employee in an FHWA report. The employer must note, however, in the RSPA report, the dual coverage with FHWA.

It is important to remember that the foregoing reporting requirements apply to MIS only. The results of all CMV drivers would still have to be retained in the driver's qualification file for purposes of complying with the FHWA drug testing rule, even where the information is reported to RSPA and not to FHWA.

However, for post-accident tests, the results would have to be submitted to the OA whose rules govern the required test regardless to which OA the employer decided to submit the MIS data for that employee. In the above example, if a pipeline company driver has a commercial motor vehicle accident which triggers a post-accident test solely under the FHWA's rules, in other words while driving the commercial motor vehicle, the result of this post-accident test must be reported, under the MIS, to the FHWA regardless of whether the employer chose to report the other tests to RSPA. In the different case of a test being performed because two or more OAs' rules require the test, the motor carrier would have to decide to which agency to report. In all circumstances, the MIS reporting requirements proposed in this NPRM would not relieve the motor carrier of reporting the accident to the FHWA, including the results of a post-accident test, as required by § 394.9(b) of the Federal Motor Carrier Safety Regulations (FMCSRs).

Note: The FHWA has published an NPRM which would remove the accident reporting requirements of 49 CFR part 394. (57 FR 33712)

The FHWA is also proposing that the summary information be compiled by the motor carrier and, if requested to do so, submitted to the FHWA by February 15 of the following year (e.g., 1992 data would be compiled no later than February 15, 1993). Motor carriers would not be required to submit the information to the FHWA unless requested to do so. Because of the immense size of the motor carrier industry (over 250,000 identified interstate motor carriers), the FHWA intends to randomly select motor carriers using the statistical sampling method Sampling with Replacement and would require these selected motor carriers to submit the required information to the FHWA.

The FHWA maintains a database of all known interstate motor carriers. The FHWA proposes to perform the following random selection based on nine random selection pools with one pool for each FHWA region. The FHWA proposes to assign a random number, which will be generated by a statistical computer program, to each active motor carrier on the database. The computer program will sort the motor carriers, in ascending or descending order, by the random number assigned to each carrier. The FHWA will then select a certain percentage each year, between two and ten percent, of those carriers subject to 49 CFR part 391, subpart H to be notified that a report must be submitted by the deadline. For example, the FHWA determines that two percent of the motor carriers will be required to submit data in a given year. The active motor carrier population for FHWA Region 7 (Kansas, Nebraska, Iowa and Missouri) for a given hypothetical year is 50,000. The FHWA determines that the first 1,000 motor carriers (50,000 multiplied by 0.02 (two percent) equals 1,000) in ascending order on the compiled list of randomly-ordered motor carriers for the region will be requested to submit the required report to the FHWA. The FHWA has strongly encouraged motor carriers to use this method in their random selection of drivers for testing under § 391.109.

The FHWA will also continue to examine drug testing records as part of its on-site review activities. While the summary information to be required by the proposed § 391.87(h) would not need to be completed and submitted until February 15 of the following year, the FHWA will continue to review motor carriers' drug testing programs at any time during the year.

Records Regarding the Administration of Drug Testing Program

The FHWA has received numerous requests for clarification of what is meant in the current rule by the "records regarding the administration" of the motor carriers' drug testing program. In order to spell out this requirement, the FHWA proposes to amend § 391.87(h) to require the maintenance and retention of all agreements with collection facilities, laboratories, MROs, consortia, of names and positions of company officials and their roles in the motor carrier's drug testing program, of monthly laboratory summaries, and of recordkeeping and testing procedures, including random testing selection and notification procedures.

Elsewhere in today's **Federal Register** is the parallel "MIS" NPRM regarding 49 CFR part 40. The preamble to that NPRM contains many comments, discussions and questions that should be considered in reviewing this NPRM. Your comments on this NPRM should indicate that you are responding to questions or provisions in the generic NPRM under 49 CFR part 40 or to this specific FHWA NPRM.

Rulemaking Analyses and Notices

Regulatory Impact

The action taken by the FHWA in this document proposes to amend subpart H of part 391 of the FMCSRs and is consistent with an NPRM also being published in today's **Federal Register** by the Department of Transportation, Office of the Secretary, regarding the collection and reporting of drug and alcohol testing data. The Department's proposed rule amends 49 CFR part 40 by setting forth a system to measure the effectiveness of drug and alcohol testing programs of the various operating administrations. This NPRM by FHWA implements the DOT system. Together, the two NPRMs would require motor carriers subject to the drug testing requirements of 49 CFR part 391 and the drug and alcohol testing requirements proposed elsewhere in today's **Federal Register**, to maintain specific information and report annually to the FHWA, if requested to do so, certain information about their drug and alcohol testing programs. A representative sample of motor carriers would be randomly selected to submit the data. The random selection would generate sufficient data to produce statistically valid results. The FHWA would use the data to analyze its current approach to deterring and detecting illegal drug use within the motor carrier industry and, as appropriate, plan a

more efficient and effective means to attain program goals. Interstate motor carriers are currently required to maintain most of the information that would be reported. The regulatory impact, therefore, is considered to be minimal to interstate motor carriers. Separate regulatory impact analyses have been prepared for the drug and alcohol NPRMs, proposed elsewhere in today's **Federal Register**, and should be referred to for additional information. The information may be obtained in FHWA Docket Numbers MC–92–19 and MC–92–23, which is available for inspection in the FHWA Docket room, 400 Seventh Street, SW., Washington, DC.

Executive Order 12291 (Federal Regulation) and DOT Regulatory Policies and Procedures

The FHWA has determined that this document does not contain a major rule under Executive Order 12291, but is a significant regulation under the DOT regulatory policies and procedures because of substantial congressional and public interest in precluding the operation of a commercial motor vehicle by a driver who uses illegal drugs. The impacts of these proposed provisions addressed in this document have already been considered by the impact documentation prepared for the November 21, 1988, final rule. Any changes to the November 21, 1988, final rule resulting from this document would not appreciably affect the impact documentation initially prepared for FHWA Docket No. MC–116.

Such impact documentation contained in the November 21, 1988, final rule includes a Regulatory Impact Analysis which is available for inspection in the Headquarters Office of the FHWA, 400 Seventh Street, SW., Washington, DC.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354), the agency has evaluated the effects of this rulemaking on small entities. It is anticipated that the impacts resulting from the proposed amendments contained in this document do not differ significantly from those already considered in the adoption of the November 21, 1988, final rule. Accordingly, under the criteria of the Regulatory Flexibility Act, the FHWA hereby certifies that the action contained in this document will not have a significant economic impact on a substantial number of small entities which is in addition to that imposed by the November 21, 1988, final rule.

Executive Order 12612 (Federalism Assessment)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that this proposed rule, if promulgated, would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment in addition to that already prepared for the November 21, 1988, final rule.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.217, Motor Carrier Safety. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980 (Pub. L. 96–511), the reporting and recordkeeping provisions that are included in this proposed regulation are being submitted for approval to the Office of Management and Budget (OMB).

National Environmental Policy Act

The agency has analyzed this action for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and has determined that this action would not have any effect on the quality of the environment.

Regulatory Identification Number

A regulatory identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

List of Subjects in 49 CFR Part 391

Controlled substances, Highways and Roads, Highway safety, Motor carriers, Motor vehicle safety.

Issued on: December 2, 1992.

Andrew H. Card, Jr.,
Secreary of Transportation.
Thomas D. Larson,
Administrator.

In consideration of the foregoing, the FHWA is proposing to amend title 49, Code of Federal Regulations, subchapter B, chapter III, part 391 as set forth below:

PART 391—QUALIFICATION OF DRIVERS

1. The authority citation for part 391 continues to read as follows:

Authority: 49 U.S.C. App. 2505; 49 U.S.C. 504 and 3102; 49 CFR 1.48.

2. In § 391.87, paragraph (h) is revised to read as follows:

§ 391.87 Notification of test results and recordkeeping.

* * * * *

(h) A motor carrier shall maintain all administrative records pertaining to its controlled substances testing program and an annual (calendar year) summary of the results of its controlled substances testing program performed under this subpart.

(1) The administrative records shall include agreements with collection facilities, laboratories, MROs, consortia, name and positions of company officials and their role in the motor carrier's drug testing program, monthly laboratory summaries, recordkeeping and testing procedures, including random testing selection and notification procedures.

(2) The summary shall include, as a minimum (See appendix H to subchapter B for more detail and format):

(i) Number of drivers by employee category;

(ii) Number of drivers subject to testing under the anti-drug rules of more than one DOT Agency, identified by each agency;

(iii) Number of specimens collected by type of test (e.g., pre-employment, random, reasonable cause, post-accident) and employee category;

(iv) Number of positives verified by a Medical Review Officer (MRO) by type of test, type of drug and employee category;

(v) Number of negatives verified by a MRO by type of test, and employee category;

(vi) Number of persons denied a position as a driver following a verified drug test;

(vii) Number of drivers verified positive by a MRO who were returned to duty as a driver during the reporting period;

(viii) Number of drivers with tests verified positive by a MRO for multiple drugs;

(ix) Number of drivers who refused to submit to a drug test required under this subpart, and the action taken in response in the refusal(s); and

(x) Number of drivers and supervisors who have received required training during the reporting period.

(3) The annual summary shall be completed and submitted, if requested,

to the FHWA, Office of Motor Carriers, 400 Seventh Street, SW., Washington, DC 20590 no later than February 15 of the following year.

3. Subchapter B is amended by adding appendix H to read as follows:

BILLING CODE 4910-22-M

APPENDIX H - DRUG AND ALCOHOL TESTING MIS DATA COLLECTION FORM

GENERAL INSTRUCTIONS

This reporting form includes three parts. Collectively, these parts address the data elements required in the Federal Highway Administration (FHWA) and the U.S. Department of Transportation (DOT) drug and alcohol testing regulations. Each part of the form is preceded by instructions which outline and explain the information requested and indicate the probable sources for this information. The three parts of the form are:

Section	Instructions Pages	Reporting Form Pages
I. ORGANIZATIONAL INFORMATION	i-ii	1-2
II. DRUG TESTING INFORMATION	iii-vii	3-7
III. ALCOHOL TESTING INFORMATION	viii-xi	8-11

I. ORGANIZATIONAL INFORMATION

INSTRUCTIONS

This part of the reporting form includes two sections. These sections, the page number for the instructions, and the page location on the reporting form are:

Section	Instructions Page	Reporting Form Page
A. EMPLOYER INFORMATION	i	1
B. COVERED EMPLOYEES	ii	2

Page 1 **EMPLOYER INFORMATION** (Section A) requires the company name for which the report is done and a current address. Below this, a signature, date, and current telephone (including the area code) are entered by the person certifying the correctness and completeness of the form.

Page 2

COVERED EMPLOYEES (Section B) requires a count for each employee category that must be tested under DOT regulations. There is only one category of covered employees for FHWA, and that is "Drivers" in the tables. The most likely source for this information is the employer's personnel department. These counts should be based on the company records for the reported year.

Additional information must be completed if your company employs personnel who perform duties covered by the drug and alcohol rules of more than one DOT operating administration. NUMBER OF EMPLOYEES COVERED BY MORE THAN ONE DOT OPERATING ADMINISTRATION, requires that you identify the number of employees in each employee category under the appropriate additional operating administration(s).

For Office Use Only

FHWA DRUG AND ALCOHOL TESTING MIS DATA COLLECTION FORM

YEAR COVERED BY THIS REPORT: 19___

A. MOTOR CARRIER EMPLOYER INFORMATION

Company _____

Principal Place of Business for Safety:

Physical Address _____

_____

Mailing Address _____

_____

U.S. DOT Number _____ ICC Number _____

I, the undersigned, certify the attached United States Department of Transportation Drug Testing Management Information System Data Collection Form, is to the best of my knowledge and belief, a true, correct, and complete form for the period stated.

_____
Signature

_____
Title

_____
Date of Signature

_____
Phone Number

Title 18, U.S.C. Section 1001, makes it a criminal offense subject to a maximum fine of $10,000, or imprisonment for not more than 5 years, or both, to knowingly and willfully make or cause to be made any false or fraudulent statements or representations in any matter within the jurisdiction of any agency of the United States.

B. COVERED EMPLOYEES

COVERED EMPLOYEES						
EMPLOYEE CATEGORY	NUMBER OF COVERED EMPLOYEES	NUMBER OF EMPLOYEES COVERED BY MORE THAN ONE DOT OPERATING ADMINISTRATION				
		FAA	FRA	FTA	RSPA	USCG
Drivers						

II. DRUG TESTING INFORMATION

INSTRUCTIONS

The following instructions are to be used as a guide for completing the drug testing information in the Federal Highway Administration (FHWA) and the U.S. Department of Transportation (DOT) **Drug and Alcohol Testing Management Information System Data Collection Form**. These instructions outline and explain the information requested and indicate probable sources for this information. A sample testing results table with a narrative explanation is provided on pages v-vi as an example to facilitate the process of completing the form correctly.

This part of the reporting form includes four sections. These sections address the data elements required in the regulations. These sections, the page number for the instructions, and the page location on the reporting form are:

Section	Instructions Page	Reporting Form Page
A. JOB APPLICANT TESTING INFORMATION	iv	4
B. EMPLOYEE TESTING	vi	4-6
C. OTHER TESTING/PROGRAM INFORMATION	vi	6
D. TRAINING/EDUCATION	vii	7

Sections A and B are used to summarize the drug testing results for covered employees. There are six tables to be completed (one in Section A and five in Section B). The first table (Section A) is where you enter the data on pre-employment testing. The five tables in Section B are for entering drug testing data on periodic, random, post-accident, reasonable cause, and return to duty testing, respectively. Items necessary to complete these tables include:

1) the number of specimens collected in each employee category;
2) the number of specimens tested which were verified negative and verifed positive for any drug(s), and
3) individual counts of those specimens which were verified positive for each of the five drugs.

Do not include results of quality control (QC) samples submitted to the testing laboratory in any of the tables.

A sample table with detailed instructions is provided for Section A, **JOB APPLICANT TESTING INFORMATION**. The format and explanations used for the sample table apply to all six of the tables in Sections A and B.

Information on actions taken with those persons testing positive is required at the end of both Sections A and B. Specific instructions for providing this latter information are given after the instructions for completing the tables in Sections A and B.

Page 4

JOB APPLICANT TESTING INFORMATION (Section A) requires information for pre-employment testing. All numbers entered into this table should be separated into the category of employment for which the applicant was applying. A sample table with example numbers is presented on page v.

Three types of information are necessary to complete the left side of this table. The first blank column with the heading "**NUMBER OF SPECIMENS COLLECTED,**" requires a count for all collected specimens by employee category. It should not include refusals to test. The second blank column with the heading "**NUMBER OF SPECIMENS VERIFIED NEGATIVE,**" requires a count for all completed tests by employee category that were verified negative by your Medical Review Officer (MRO).

The third blank column with the heading "**NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS,**" refers to the number of specimens provided by job applicants that were verified positive. "Verified positive" means the results were verified by your MRO.

The right hand portion of this table, with the heading "**NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG,**" requires counts of positive tests **for each** of the five drugs for which tests were done, i.e., marijuana (THC), cocaine, phencyclidine (PCP), opiates, and amphetamines. The number of specimens positive for each drug should be entered in the appropriate column for that drug type. Again, "verified positive" refers to test results verified by your MRO.

If an applicant tested positive for more than one drug; for example, both marijuana and cocaine, that person's positive results would be included once in each of the appropriate columns (marijuana and cocaine).

A sample table is provided on page v with example numbers.

Page 4

Below the table for pre-employment testing information is a box with the heading "**Number of persons denied a position as a covered employee following a verified positive drug test**". This is simply a count of those persons who were not placed in a covered position because they tested positive for one or more drugs.

SAMPLE APPLICANT TEST RESULTS TABLE

The following example is for Section A, **JOB APPLICANT TESTING INFORMATION**, which summarizes pre-employment testing results. The procedures detailed here also apply to the tables in Section B which require you to summarize testing results for employees. This example will use the category "Drivers" (which is the only category of employees for FHWA) to illustrate the procedures for completing the form.

A — Urine specimens were collected for 157 job applicants for operator positions during the reporting year. This information is entered in the first blank column of the table in the row marked "Drivers".

B — The Medical Review Officer (MRO) for your company reported that 153 of those 157 specimens from applicants for operator positions were negative (i.e., no drugs were detected). Enter this information in the second blank column of the table in the row marked "Drivers".

C — The MRO for your company reported that 4 of those 157 specimens from applicants for operator positions were positive (i.e., a drug or drugs were detected). Enter this information in the third blank column of the table in the row marked "Drivers".

D — With the 4 specimens that tested positive, the following drugs were detected:

Specimen	Drugs
#1	Marijuana
#2	Amphetamines
#3	Marijuana and Cocaine (Multi-drug specimen)
#4	Marijuana

PRE-EMPLOYMENT TESTING

EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Operator	157	153	4	3	1	0	0	1
Maintenance	107	105	2	1	0	0	1	0
	0	0	0	0	0	0	0	0
TOTAL	264	258	6	4	1	0	1	1

A B C D E

Marijuana was detected in three (3) specimens, cocaine in one (1), and amphetamines in one (1). This information is entered in the columns on the right hand side of the table under each of these drugs. Since two different drugs were detected in specimen #3 (multi-drug), entries are made in both the marijuana and the cocaine columns for this specimen. Information on multi-drug specimens must also be entered in Section C, **OTHER TESTING/PROGRAM INFORMATION**, on page 6 of the reporting form.

Note that adding up the numbers for each type of drug in a row ("NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG") will not always match the number entered in the third column, "NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS". The total for the numbers on the right hand side of the table may differ from the number of specimens testing positive since some specimens may contain more than one drug.

Remember that the same procedures indicated above are to be used for completing all of the tables in Sections A and B.

Pages 4-6 — **EMPLOYEE TESTING** (Section B), as indicated, requires information for company employees in a **covered position** only (i.e. "Drivers"). A separate table must be completed for each category of test. These categories include: (1) periodic, (2) random, (3) post-accident, (4) reasonable cause, and (5) return to duty testing. These tables are to be filled out like the sample table above. Again, these numbers **do not** include refusals for testing.

Page 6 — Following these tables that summarize **EMPLOYEE TESTING**, you must provide counts for employees who have tested positive and are currently in, or have completed rehabilitation, and have returned to work in a covered position. Report this information only for employees who tested positive during this reporting period. This information should be available from the personnel office and/or drug program manager.

Page 6 — **OTHER TESTING/PROGRAM INFORMATION** (Section C) requires that you complete a table dealing with specimens positive for more than one drug and a table dealing with employees who refused to submit to a drug test.

Page 6 — **SPECIMENS VERIFIED POSITIVE FOR MORE THAN ONE DRUG** requires information on specimens that contained more than one drug. Indicate the **EMPLOYEE CATEGORY** and the **NUMBER OF VERIFIED POSITIVES**, then check the appropriate columns indicating the combination of drugs reported as positive. For example, if marijuana and cocaine were detected in 3 driver specimens, then you would write "Drivers" as the employee category, "3" as the number of verified positives, and "3" in the columns for "Marijuana" and "Cocaine". If marijuana and opiates were detected in 2 driver specimens, then you would write "Drivers" as the employee category, "2" as the number of verified positives, and "2" in the columns for "Marijuana" and "Opiates".

Page 6 **EMPLOYEES WHO REFUSED TO SUBMIT TO A DRUG TEST** requires information on the **NUMBER OF COVERED EMPLOYEES** who refused to submit to a drug test required under this regulation, and a description of the **ACTION TAKEN** in response to the refusal. An example of an action taken would be "removed from covered duties pending termination".

Page 7 **TRAINING/EDUCATION** (Section D) requires information on the number of covered employees and supervisory personnel who have received the required drug training during the current reporting period.

READ BEFORE COMPLETING THE REMAINDER OF THIS FORM:

1. All items refer to the **current** reporting period **only** (for example, January 1, 1993 - December 31, 1993).

2. This report is only for testing **REQUIRED BY THE FEDERAL HIGHWAY ADMINISTRATION (FHWA) AND THE U.S. DEPARTMENT OF TRANSPORTATION (DOT)**:

   - Results should be reported only for employees in **COVERED POSITIONS** as defined by FHWA/DOT drug testing regulations.

   - The information requested should only include testing for marijuana (THC), cocaine, phencyclidine (PCP), opiates, and amphetamines using the standard procedures required by DOT regulation 49 CFR Part 40.

3. Information on refusals for testing should only be reported in Section C ("OTHER TESTING/PROGRAM INFORMATION"). Do not include refusals for testing in other sections of this report.

4. Do not include the results of any quality control (QC) samples submitted to the testing laboratory in any of the tables.

5. Complete all items; DO NOT LEAVE ANY ITEM BLANK. If the value for an item is zero (0), place a zero (0) on the form.

This part of the form requires information on VERIFIED POSITIVE and VERIFIED NEGATIVE drug tests. These are the results that are reported to you by your Medical Review Officer (MRO).

A. JOB APPLICANT TESTING INFORMATION

PRE-EMPLOYMENT TESTING								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Drivers								

Number of persons denied a position as a covered employee following a verified positive drug test: [ ]

B. EMPLOYEE TESTING

PERIODIC TESTING								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Drivers								

B. EMPLOYEE TESTING (continued)

RANDOM TESTING

EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED -NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Drivers								

POST-ACCIDENT TESTING

EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Drivers								

REASONABLE CAUSE TESTING

EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Drivers								

B. EMPLOYEE TESTING (continued)

RETURN TO DUTY TESTING								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Drivers								

Number of employees, currently in or having completed rehabilitation or otherwise qualified to return to duty, who have returned to work in a covered position during this reporting period: ____

C. OTHER TESTING/PROGRAM INFORMATION

SPECIMENS VERIFIED POSITIVE FOR MORE THAN ONE DRUG						
EMPLOYEE CATEGORY	NUMBER OF VERIFIED POSITIVES	Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines

EMPLOYEES WHO REFUSED TO SUBMIT TO A DRUG TEST	
NUMBER OF COVERED EMPLOYEES	ACTION TAKEN

D TRAINING/EDUCATION

Training During Current Reporting Period

Number of covered employees who have received initial training on the consequences, manifestations, and behavioral cues of drug use as required by FHWA drug testing regulations: [ ]

Number of supervisory personnel who have received initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable drug use as required by FHWA drug testing regulations: [ ]

Number of covered employees who have received recurrent or refresher training on the consequences, manifestations, and behavioral cues of drug use: [ ]

Number of supervisory personnel who have received recurrent or refresher training on the specific contemporaneous physical, behavioral, and performance indicators of probable drug use: [ ]

III. ALCOHOL TESTING INFORMATION

INSTRUCTIONS

The following instructions are to be used as a guide for completing the alcohol testing information for the Federal Highway Administration (FHWA) and the U.S. Department of Transportation (DOT) **Drug and Alcohol Testing Management Information System Data Collection Form**. These instructions outline and explain the information requested and indicate probable sources for this information. A sample testing results table with a narrative explanation is provided on pages ix-x as an example to facilitate the process of completing the form correctly.

This part of the reporting form includes four sections. These sections address the data elements required in the regulations. These sections, the page number for the instructions, and the page location on the reporting form are:

Section	Instructions Page	Reporting Form Page
A. JOB APPLICANT TESTING INFORMATION	ix	8
B. EMPLOYEE TESTING	x	9-10
C. OTHER TESTING/PROGRAM INFORMATION	xi	11
D. TRAINING/EDUCATION	xi	11

Sections A and B are used to summarize the alcohol testing results for covered employees. There are six tables to be completed (one in Section A and five in Section B). The first table (Section A) is where you enter the data on pre-employment/pre-duty testing. The five tables in Section B are for entering alcohol testing data for random, post-accident, reasonable suspicion, return to duty, and follow-up testing, respectively. Items necessary to complete these tables include:

1) the number of initial alcohol tests performed for each employee category;
2) the number of confirmatory alcohol tests performed for each employee category;
3) the number of confirmatory test results which were equal to or greater than 0.04; and
4) the number of confirmatory test results which were equal to or greater than 0.02, but less than 0.04.

A sample table with detailed instructions is provided for Section A, **JOB APPLICANT TESTING INFORMATION**. The format and explanations used for the sample table apply to all six of the tables in Sections A and B.

Information on actions taken with those persons whose alcohol test results were 0.04 or greater is required at the end of both Sections A and B. Specific instructions for providing this latter information are given after the instructions for completing the tables in Sections A and B.

Page 8

JOB APPLICANT TESTING INFORMATION (Section A) requires information for pre-employment/pre-duty testing. All numbers entered into this table should be separated into the category of employment for which the applicant was applying. A sample table with example numbers is presented on page x.

Four types of information are necessary to complete the left side of this table. The first blank column with the heading "**NUMBER OF INITIAL TESTS**" requires a count of all initial alcohol tests performed for each employee category. It should not include refusals to test. The second blank column with the heading "**NUMBER OF CONFIRMATORY TESTS**" requires a count of all confirmatory alcohol tests performed for each employee category.

The third blank column with the heading "**NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04**" requires a count for each employee category.

The fourth blank column with the heading "**NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04**" requires a count for each employee category.

A sample table is provided on page x with example numbers.

Page 8

Below the table for pre-employment testing information is a box with the heading "**Number of persons denied a position as a covered employee following a pre-employment/pre-duty alcohol test indicating an alcohol concentration of 0.04 or greater**". Enter the appropriate number in the box provided.

SAMPLE APPLICANT TEST RESULTS TABLE

The following example is for Section A, **JOB APPLICANT TESTING INFORMATION**, which summarizes pre-employment/pre-duty testing results. The procedures detailed here also apply to the tables in Section B which require you to summarize testing results for employees. This example will use the category "Drivers" (which is the only category of employees for FHWA) to illustrate the procedures for completing the form.

A

Initial tests were performed on 157 job applicants for driver positions during the reporting year. This information is entered in the first blank column of the table in the row marked "Drivers".

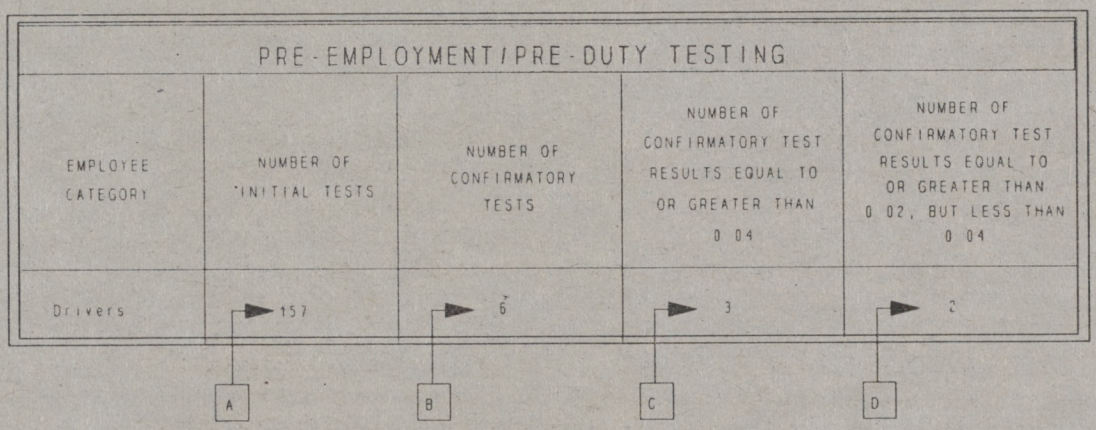
B

Confirmatory tests were necessary for 6 of the 157 applicants for driver positions. Enter this information in the second blank column of the table in the row marked "Drivers". The confirmatory test results for these 6 applicants were the following:

Applicant	Confirmation Result
#1	0.06
#2	0.01
#3	0.11
#4	0.04
#5	0.03
#6	0.02

C — The confirmatory test results for 3 of the applicants for driver positions were equal to or greater than 0.04. Enter this information in the third blank column of the table in the row marked "Drivers".

D — The ccnfirmatory test results for 2 of the applicants for driver positions were equal to or greater than 0.02, but less than 0.04. Enter this information in the fourth blank column of the table in the row marked "Drivers".



Note that adding up the numbers for confirmation results in columns three and four will not always match the number entered in the second column, "NUMBER OF CONFIRMATORY TESTS". These numbers may differ since some confirmatory test results may be less than 0.02.

Remember that the same procedures indicated above are to be used for completing all of the tables in Sections A and B.

Pages 9-10 **EMPLOYEE TESTING** (Section B), as indicated, requires information for company employees in **covered positions** only. A separate table must be completed for each category of test. These categories include: (1) random, (2) post-accident, (3) reasonable suspicion, (4) return to duty, and (5) follow-up testing. These tables are to be filled out like the sample table above. Again, these numbers **do not** include refusals for testing.

Page 10 — Following the table that summarizes return to duty testing, you must provide a count of the **"Number of employees with a confirmatory alcohol test indicating an alcohol concentration of 0.04 or greater who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in DOT regulations)"**. Report this information only for employees who were tested during this reporting period. This information should be available from the personnel office and/or alcohol program manager.

Pages 11 — **OTHER TESTING/PROGRAM INFORMATION** (Section C) requires that you provide information on employees who tested positive for drugs and alcohol (at the same time), information on violations of other alcohol provisions (not necessarily resulting in positive alcohol tests), and information on employees who refused to submit to an alcohol test.

Page 11 — **Number of employees administered drug and alcohol tests at the same time resulting in a verified positive drug test and an alcohol test indicating an alcohol concentration of 0.04 or greater**, requires that a count of all such employees be entered in the indicated box.

Page 11 — **VIOLATIONS OF OTHER ALCOHOL PROVISIONS/PROHIBITIONS OF THIS REGULATION**, requires information on the **NUMBER OF COVERED EMPLOYEES** committing such a violation, a description of the **VIOLATION** committed (e.g., pre-duty alcohol use, on duty alcohol use, on duty alcohol possession), and a description of the **ACTION TAKEN** in response to the violation.

Page 11 — **EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST** requires information on the **NUMBER OF COVERED EMPLOYEES** who refused to submit to an alcohol test as required under this regulation, and a description of the **ACTION TAKEN** in response to the refusal.

Page 11 — **TRAINING/EDUCATION** (Section D) requires information on the number of supervisory personnel who have received the required alcohol training during the current reporting period.

READ BEFORE COMPLETING THE REMAINDER OF THIS FORM:

1. All items refer to the **current** reporting period **only** (for example, January 1, 1993 - December 31, 1993).

2. This report is only for testing **REQUIRED BY THE FEDERAL HIGHWAY ADMINISTRATION (FHWA) AND THE U.S. DEPARTMENT OF TRANSPORTATION (DOT)**:

   - Results should be reported only for employees in **COVERED POSITIONS** as defined by FHWA/DOT alcohol testing regulations.
   - The information requested should only include testing for alcohol using the standard procedures required by DOT regulation 49 CFR Part 40.

3 Information on refusals for testing should only be reported in Section C ("OTHER TESTING/PROGRAM INFORMATION"). Do not include refusals for testing in other sections of this part of the report.

4. Complete all items; DO NOT LEAVE ANY ITEM BLANK. If the value for an item is zero (0), place a zero (0) on the form.

A. JOB APPLICANT TESTING INFORMATION

PRE-EMPLOYMENT/PRE-DUTY TESTING				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Drivers				

Number of persons denied a position as a covered employee following a pre-employment/pre-duty alcohol test indicating an alcohol concentration of 0.04 or greater: [ ]

B. EMPLOYEE TESTING

RANDOM TESTING				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Drivers				

POST-ACCIDENT TESTING				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Drivers				

REASONABLE SUSPICION TESTING				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Drivers				

B. EMPLOYEE TESTING (continued)

RETURN TO DUTY TESTING				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Drivers				

Number of employees with a confirmatory alcohol test indicating an alcohol concentration of 0.04 or greater who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in FHWA regulations): [ ]

FOLLOW-UP TESTING				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Drivers				

C. OTHER TESTING/ PROGRAM INFORMATION

Number of employees administered drug and alcohol tests at the same time resulting in a verified positive drug test and an alcohol test indicating an alcohol concentration of 0.04 or greater: [ ]

VIOLATIONS OF OTHER ALCOHOL PROVISIONS/PROHIBITIONS OF THIS REGULATION		
NUMBER OF COVERED EMPLOYEES	VIOLATION	ACTION TAKEN

EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST	
NUMBER OF COVERED EMPLOYEES	ACTION TAKEN

D. TRAINING/EDUCATION

Training During Current Reporting Period

Number of supervisors who have received the required training in determining the existence of reasonable suspicion of alcohol misuse: [ ]

[FR Doc. 92-29680 Filed 12-10-92; 10:00 am]
BILLING CODE 4910-22-C

49 CFR Part 382

[FHWA Docket No. MC–92–23]

RIN 2125–AD06

Federal Motor Carrier Safety Regulations; Controlled Substances and Alcohol Use and Testing; Commercial Driver's License Standards, Requirements and Penalties; Hours of Service of Drivers

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FHWA is requesting comments on a proposed rule which would mandate testing of drivers who operate commercial motor vehicles (CMV) for the use of controlled substances. This action is being taken in response to the Omnibus Transportation Employee Testing Act of 1991 and complements existing regulatory prohibitions on controlled substances use. This proposal is consistent with a companion NPRM published by the FHWA on alcohol testing and an NPRM on alcohol and drug testing procedures published by the Office of the Secretary, U.S. Department of Transportation. These two NPRMs are published elsewhere in today's **Federal Register**.

The overall goal of testing is to ensure that persons who use controlled substances are not allowed to operate a commercial motor vehicle which, in turn, would reduce accidents, fatalities, and injuries in motor carrier operations.

DATES: Comments must be received on or before April 14, 1993.

ADDRESSES: All signed, written comments should refer to the docket number MC–92–23 and should be submitted to HCC–10, room 4232, Office of the Chief Counsel, 400 Seventh Street, SW., Washington, DC 20590. All comments received will be available for examination at the above address from 8:30 a.m. to 3:30 p.m., e.t., Monday through Friday, except Federal legal holidays.

FOR FURTHER INFORMATION CONTACT: Mr. David Miller, Office of Motor Carrier Standards, (202) 366–2981, or Mr. David Sett, Office of the Chief Counsel, (202) 366–0834, Federal Highway Administration, Department of Transportation, 400 Seventh Street SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal legal holidays.

Additional information on existing regulatory requirements in this area may be obtained through the Department of Transportation's Anti-Drug Information Center (ADIC) system. The public may access the system by dialing (800) 225–3784 using a touch tone telephone. Access to a computer system may also be made using a personal computer connected via modem on (800) 225–3804. A user fee will be charged for certain services provided by the system.

SUPPLEMENTARY INFORMATION:

I. Statutory Authority

The Omnibus Transportation Employee Testing Act of 1991 (the Act) was signed by President Bush on October 28, 1991, as part of the 1992 Department of Transportation and Related Agencies Appropriations Act, Public Law 102–143, title V, 105 Stat. 917, 952 (1991). The Act requires the Secretary of Transportation to promulgate regulations for alcohol and controlled substances testing for persons in safety-sensitive positions in four modes of transportation: motor carrier, airline, railroads and mass transit. The requirements of the Act are addressed in the Office of the Secretary of Transportation's NPRM preamble to amend 49 CFR part 40 which are published elsewhere in today's issue of the **Federal Register** and are fully incorporated herein.

Section 5 of the Act addresses the requirements for motor carriers. This section amends the Commercial Motor Vehicle Safety Act of 1986 (CMVSA), Public Law 99–570, 100 Stat. 3207–170 (codified at 49 U.S.C. app. 2701–2718). The CMVSA establishes the requirements for the commercial driver's license (CDL). The FHWA has implemented the CDL provisions of the CMVSA through the publication of several final rules. A discussion of the CDL requirements, including who is required to obtain a CDL, is included under section V, Commercial driver's license program, later in this preamble.

The Act requires the Secretary to issue regulations by October 28, 1992, requiring motor carriers to conduct pre-employment, reasonable suspicion, random and post-accident testing of drivers for the use of alcohol or a controlled substance which use constitutes a violation of law or Federal regulation. Congress recognized that the FHWA has already issued regulations for controlled substances testing (49 CFR part 391, subpart H) and that the procedures for testing are similar to the scientific and technical guidelines established by the Department of Health and Human Services. See 49 CFR part 40. The FHWA believes it is the intent of Congress that FHWA's current controlled substances regulations be incorporated into the regulations required to be issued under the Omnibus Act. (See section III, Regulatory history, below.)

The Act provides for several significant changes to the current controlled substances testing requirements. These changes include:

1. Testing for controlled substances and alcohol use;
2. Using the definition of a commercial motor vehicle as defined in the CMVSA;
3. Requiring a test after all accidents in which there is a fatality;
4. Requiring that a split sample urine specimen for controlled substances be collected;
5. Requiring pre-employment, reasonable suspicion, random and post-accident testing;
6. Allowing, but not requiring, periodic testing;
7. Requiring referral to a substance abuse professional and providing for the opportunity for rehabilitation;
8. Expressly preempting inconsistent State or local laws;
9. Gives the Secretary the authority to determine sanctions for drivers who use controlled substances or alcohol in violation of Federal regulation but are not under the influence as defined by the CMVSA; and
10. Testing consistent with international obligations of the United States.

II. Regulatory History

The FHWA published in the **Federal Register** a final rule on November 21, 1988, setting forth regulations to require motor carriers who operate commercial motor vehicles in interstate commerce to have an anti-drug program, including the testing of commercial motor vehicle drivers for the use of controlled substances. See 53 FR 47134, codified at 49 CFR part 391, subpart H. That rule required carriers to conduct five types of controlled substances tests: pre-employment/use, periodic, reasonable cause, post-accident and random. Generally, interstate drivers of commercial motor vehicles with a gross vehicle weight rating (GVWR) more than 26,000 pounds, vehicles transporting hazardous materials which are required to be placarded, or vehicles designed to transport more than 15 passengers, including the driver, are covered by this final rule.

On the same date, November 21, 1988, the Office of the Secretary, U.S. Department of Transportation (OST) published an interim final rule, "Procedures for Transportation Workplace Drug Testing Programs." See 53 FR 47002, later codified at 49 CFR

part 40. On December 1, 1989, the OST published a final rule amending certain portions of the interim final rule, see 54 FR 49854. These final and interim final rules are being referred to in this document as the "OST rule."

Subsequent to the publication of our November 21, 1988, FHWA final rule, the FHWA published several notices relating to the controlled substances testing requirements. These publications are summarized as follows:

1. Final rule, November 6, 1989: Clarifies which types of tests must be performed by December 21, 1989, and deferred implementation of random and post-accident testing until a preliminary injunction was resolved. 54 FR 46616.

2. Final rules, September 27, 1989, December 27, 1989, April 24, 1991, and July 14, 1992: Delaying the effective date of the controlled substances regulations to foreign motor carriers and their drivers. 54 FR 39546; 53294; 56 FR 18994; 57 FR 31277.

3. Interim final rule, February 1, 1990: Amends the requirements for preemployment/use and post-accident testing and includes several interpretations and technical amendments. 55 FR 3546.

4. Final rule, August 16, 1991: Provides for an implementation schedule for random and post-accident testing based on favorable court action. 56 FR 40806.

Subsequent to the publication of our November 21, 1988 final rules, the OST published two additional documents relating to controlled substances testing as follows:

1. Notice of proposed rulemaking, July 13, 1990: Revision of the duties of the medical review officer with respect to negative tests. 55 FR 28782.

2. Notice of end of transition period, November 6, 1989: Requires the use of a custody and control form which conforms with the December 1, 1990, final rule. 55 FR 46669.

The OST has also published an advance notice of proposed rulemaking on alcohol abuse prevention programs in the transportation industry on November 2, 1989. 54 FR 46326.

All of the above referenced documents are available from the Anti-Drug Information Center (ADIC). See the **FOR FURTHER INFORMATION CONTACT** section of this Preamble for access information.

III. Legal Issues

Many of the legal issues arising from the FHWA's testing program have been addressed in the Legal Authority/Issues section of the OST general preamble for alcohol testing published in today's **Federal Register**. However, those issues unique to or highlighted by FHWA's rule and regulatory environment are more fully discussed in Section IV, Legal Issues, of the FHWA's alcohol testing rule also published in today's **Federal Register**.

IV. Commercial Driver's License Program

The current CDL regulations in 49 CFR part 383 do not contemplate testing of CMV drivers for controlled substances. Notwithstanding, the existing CDL sets forth significant penalty actions for controlled substances offenses by CMV drivers in that—

1. The commercial driver's license information system (CDLIS) prevents drivers from obtaining multiple licenses, which formerly allowed drivers to continue to drive despite revocation of a license by one State for controlled substances use convictions;

2. The CDLIS and its supporting information network allow controlled substances convictions in other States to be forwarded quickly to the driver's State of record for licensing action; and

3. A driver's conviction for driving under the influence of a controlled substance or using a CMV in the commission of certain controlled substances-related felonies result in disqualification of the driver's CDL for periods ranging from one year to life, depending on the number of offenses and the hazardous nature of the cargo. These sanctions constitute powerful deterrents against involvement with controlled substances by CMV drivers, and the program as a whole provides a strong foundation for the additional controlled substances testing requirements proposed herein.

See Section V, *Commercial driver's license program*, of the FHWA's alcohol testing rule published in today's **Federal Register** for additional discussion of the CDL program.

V. Removal of Part 391, Subpart H

This proposed rule will replace 49 CFR part 391, subpart H controlled substances testing. The present regulations for controlled substances testing are contained as a subpart to the FHWA's driver qualification regulations in part 391 which are only applicable to drivers subject to part 391. The Omnibus Act requires the FHWA to expand the scope of persons required to be tested beyond those subject to part 391. Generally, parts 390 through 399 of title 49 subchapter B are only applicable to motor carriers and drivers who operate in interstate commerce.

The Omnibus Act requires all operators of CMVs subject to the CDL requirements to be tested for controlled substances and alcohol. This expanded scope of persons will encompass far more drivers than have ever been subject to parts 390 through 399. The group will include, but is not limited to, drivers and their employers, operating wholly in intrastate commerce; employed directly by Federal, State and local governments, including school districts; and drivers with restricted use CDLs or drivers in a State that does not recognize State option waiver CDLs, i.e., farm vehicle operators, firefighters and operators of emergency equipment.

For these reasons, the FHWA believes simply changing part 391 to conform to the Omnibus Act would not be prudent. The FHWA believes that the existing controlled substances testing requirements should be moved to a new part 382 and updated to conform to the Omnibus Act.

The FHWA proposes to make part 391, subpart H ineffective on the various implementation dates of part 382 to enable motor carriers to continue to use the existing regulations until all requirements of part 382 are to be complied with fully.

Table I shows the existing regulations at 49 CFR part 391, subpart H and the section where the FHWA proposes to move the existing regulation into this proposal.

TABLE I

Name	Old section	Reason for change	New section
Purpose and scope	391.81(a)		382.701(a)
	391.81(b)		382.701(b)
	391.81(c)		382.911(d)
Applicability	391.83	Omnibus act	382.703
Definitions	391.85	Same as alcohol & subpart H	382.707

TABLE I—Continued

Name	Old section	Reason for change	New section
Notifications of test results and recordkeeping	391.87(a)		382.1005(a)
	391.87(b)		382.1007
	391.87(c)		382.1007
	391.87(d)		382.1013
	391.87(e)		382.1011
	391.87(f)		382.1005(a)
	391.87(g)		382.1017
	391.87(h)		382.1015
Access to individual test results or test findings	391.89(a)		382.1011(c)
	391.89(b)		382.1017(a)
Implementation schedule	391.93		382.715
Drug use prohibitions	391.95(a)		382.801
	391.95(b)		382.803
	391.95(c)	No medical qualification	Removed
	391.95(d)		382.807(d)
Prescribed drugs; Affirmative defense	391.97		382.1003
Reasonable cause testing requirements	391.99		382.911
	391.101		
Pre-employment testing requirements	391.103		382.903
	391.107		
Pre-employment testing exceptions	391.103(d)		382.915
Biennial (periodic) testing requirements	391.105		[Removed]
	391.107		
Random testing requirements	391.109		382.907
	391.111		
Random testing exceptions	391.109(d)		382.915
Post Accident Testing	391.113(a)	Omnibus act unenforceable	382.905(a)
	391.113(b)		Removed
	391.113(c)		382.905(e)
	391.115		382.905
Disqualifications	391.117(a)		382.807(g)
			382.807(g)
		Alcohol rule	382.809(a)
		391.117(b)	382.809(b)
		Alcohol rule	
Employee Assistance Program	391.119	Omnibus act	382.1201
EAP Training Program	391.121		382.1203
After-Care Monitoring	391.123		382.914

VI. Proposal

A new part 382 to title 49, Code of Federal Regulations, Controlled Substances and Alcohol Testing is proposed which would contain the new requirements of the Omnibus Transportation Employee Testing Act of 1991. This NPRM proposes controlled substances testing requirements as subparts G through L of new part 382. The companion NPRM on alcohol testing, also published in today's **Federal Register**, includes subparts A through F of part 382.

Based on comments received on this NPRM and the companion NPRM on alcohol testing, the FHWA will consider integration of the two proposals in one final rule.

SECTION-BY-SECTION ANALYSIS

Part 382—Controlled Substances and Alcohol Testing

Subpart G—Controlled Substances Use and Testing

Section 382.701 Purpose and scope

This section is taken from the current controlled substances testing regulations at § 391.81. Paragraph (c) of the current regulations has been moved to proposed § 382.911(e).

Section 382.703 Applicability

Currently, the FHWA's controlled substances testing requirements are part of the driver qualification standards. The requirements apply to motor carriers and drivers of the motor carriers operating in CMVs greater than 26,000 pounds GVWR who are involved in interstate commerce and are subject to the FMCSRs. Private and for-hire motor carriers of property and for-hire motor carriers of passengers are subject to the FMCSRs. However, the FMCSRs include several general exemptions for certain types of transportation, such as fire trucks and rescue vehicles involved in an emergency, governmental operations and school bus operations. Therefore, drivers involved in the exempted transportation operations are not currently required to comply with the FHWA's controlled substances testing requirements. In addition, anyone who is not required to meet the physical qualifications requirements, such as farm custom operations, apiarian industries and certain farm vehicle drivers, are also exempt from the controlled substances testing requirements. Finally, while the FMCSRs generally apply to commercial motor vehicles exceeding 10,000 pounds GVWR, the drug testing provisions of part 391 apply only to drivers of commercial motor vehicles exceeding 26,000 pounds GVWR.

The Act amends the CVMSA, and therefore, the definitions of "commercial motor vehicle" and "commerce" in the CVMSA apply. This means that the testing requirements of the Act extend to interstate and intrastate operations in commercial motor vehicles exceeding 26,000 pounds GVWR and that the FMCSR exemptions stated above and listed in 49 CFR 390.3(f) do not apply.

The FHWA is therefore proposing that the class of drivers who are required to obtain a CDL are the same drivers who would be subject to the controlled substances testing requirements of this rule. Because they are the subject of a companion rule, the FHWA is also proposing that motor carriers and drivers for those motor carriers subject to the alcohol and controlled substances testing requirements of the Federal Transit Administration (FTA), formerly the Urban Mass Transportation

Administration, be excluded from the requirements of this rule.

By the same token, the FHWA is proposing that any entity operating under a waiver of all CDL requirements, approved or authorized by the FHWA, would not be subject to the controlled substances testing requirements of the Act. This exemption from testing does not extend to holders of restricted CDLs. Accordingly, the measure of applicability is: if a person is required to obtain a CDL, that driver and the employing motor carrier must comply with these proposed controlled substances testing requirements.

This means there would be certain entities who are not required to comply with the FMCSRs, but who would now be subject to the requirements of this rule. For example, governmental and school bus drivers as well as drivers of private motor carriers of passengers would now be required to submit to tests. Governmental operations include all levels of government, Federal, State and local. Private motor carriers of passengers would include, but not be limited to, civic and church organizations.

Table II shows which groups have waivers or restricted CDLs and which groups will be required to be tested under this rule.

TABLE II—COMMERCIAL DRIVER'S LICENSE (CDL) WAIVERS

Type	CDL requirement	Tests required
Full Waiver		
Of all CDL requirements for vehicles owned/operated by Dept. of Defense.		
Non-Civilian Military Personnel —Active Duty Military Personnel —Active Duty Reserves and Nat'l Guard —National Guard Military Technicians	No CDL required	No controlled substances or alcohol testing required under 49 CFR Pt. 382.
State Option Waiver		
States may waive all CDL requirements, if waiver conditions are met.		
Farm Vehicle Operators	If State waives the individual If State DOES NOT waive the individual	No testing is required. Controlled Substances and Alcohol testing is required.
Firefighters and Other Operators of Emergency Equipment	If State waives the individual If State DOES NOT waive the individual	No testing is required. Controlled Substances and Alcohol testing is required.
Limited Waiver/Restricted CDL		
States may waive CDL knowledge and skills testing and issue restricted CDLs.		
Farm-Related Service Industries —Farm retail outlets & suppliers —Agri-chemical businesses —Livestock feeders —Custom Harvesters	The operators of these vehicles ARE required to obtain a Restricted CDL.	See Note.
Isolated Sections of Alaska	The operators of these vehicles ARE required to obtain a Restricted CDL.	See Note.

Note: Controlled substances and alcohol testing is required of these operators. Additionally, these operators shall have a pre-employment/pre-duty test for controlled substances and alcohol each time the State requires the license to be revalidated for these operators.

The FHWA is proposing the same applicability with the CDL to comply with the intent of Congress and estimates that this proposal will add about two million drivers to the current estimate of three million drivers subject to the current controlled substances testing requirements.

Paragraph (c) of this section excepts those drivers from controlled substances testing requirements who are based at or depart from home terminals in foreign nations. Implementation of controlled substances testing of foreign-domiciled commercial motor vehicle operators, mandated by the Act, will be considered in an advanced notice of proposed rulemaking published elsewhere in today's **Federal Register**. Comments on this issue should be submitted to that docket.

Section 382.705 Controlled Substances Testing Procedures

This section, similar to proposed § 382.105, Alcohol testing procedures, requires all motor carriers performing controlled substances testing to use the procedures described and set forth in 49 CFR part 40 for controlled substances testing.

Section 382.707 Definitions

The definitions unique to this part are included in this section. The terms common to title 49, chapter III, subchapter B, are already included in 49 CFR 390.5, Definitions, and are applicable to this part, unless otherwise defined. The terms, "commerce" and "commercial motor vehicle," are taken from 49 CFR part 383, the requirements for a CDL. These definitions expand the applicability to intrastate operations as well as the other operations currently exempted from the FMCSR.

The term *accident* is proposed and is identical to that being proposed in another rulemaking on accident-reporting requirements. See 57 FR 33712.

The term *on-duty* is proposed to be defined here and a conforming amendment to 49 CFR 395.2, Definitions, is also being proposed to ensure that motor carriers maintain control over the controlled substances testing procedures in those cases where the motor carrier directs the driver to

provide a urine specimen for testing under the requirements of this rule, i.e. all those except pre-employment and return-to-duty testing. The FHWA strongly encourages comments on this proposal.

The FHWA is also proposing a definition of the term "consortium" to indicate that persons other than the motor carrier may perform the actual testing and other functions, provided, however, that these functions are at the direction and/or approval (when they are done prior to the motor carrier's knowledge as may be in the case of a driver-based consortium) of the motor carrier. The FHWA will continue to hold the motor carrier responsible for compliance with these proposed requirements.

The other definitions remain the same as currently in 49 CFR part 391, subpart H.

Section 382.709 Preemption of State and Local Laws

The FHWA is proposing to add § 382.709, Preemption of State and local laws to be consistent with section 5(e)(1) of the Act. This section is similar to the proposed § 382.109. The Act contains an express preemption of State and local requirements that are "inconsistent with" the Federal controlled substances rules applicable to the highway, aviation, and transit industries. As proposed, State and local requirements are preempted whenever it is not possible to comply with both the Federal and the State or local requirements or whenever compliance with the State or local requirements would frustrate the Federal requirement. For example, a State requirement prohibiting controlled substances testing of commercial motor vehicle truck drivers would be preempted to the extent compliance with it would prevent compliance with a controlled substances test required under this part. Also, a local requirement for a blood test to confirm controlled substance use by a commercial motor vehicle motor coach driver would be preempted since it would frustrate accomplishment of the Federal rule, which does not require confirmatory blood testing.

The FHWA shares the same concern as expressed by the Congress regarding current and proposed State legislation which does or would prohibit or restrict drug and alcohol testing of certain classes of individuals and that these restrictions may impinge upon the ability to effectively implement these proposed rules. See S. Rep. No. 54, 102d Cong., 1st Sess. 33 (1991).

Paragraph (b) of proposed § 382.709 states that nothing in this part preempts State and local laws that impose criminal, civil or administrative penalties or other sanctions on a driver found, without regard to testing required by this part, to have operated a commercial motor vehicle while using controlled substances in violation of law or Federal regulation. The FHWA is committed to working with State and local officials in preventing all persons from operating a CMV while using controlled substances.

Section 382.711 Other Requirements Imposed by Motor Carriers

This section, similar to proposed § 382.111, explains that these proposed rules would not affect the motor carrier's policies or programs for prohibiting controlled substances use, testing or rehabilitation, except as provided for in these proposed rules. That is, unless these rules specifically address a motor carrier's program or policy element and the motor carrier's program or policy element does not frustrate or supersede these rules, the motor carrier may have more stringent rules. These more stringent rules must be clearly distinguished to the driver that the more stringent rules are based upon the motor carrier's own authority to impose such rules.

The Americans with Disabilities Act of 1990 (ADA), and relevant Equal Employment Opportunity Commission (EEOC) guidelines, require no changes to the current regulations for drug testing, part 391, subpart H, or the proposed rule. The FHWA's drug testing requirements are designed to detect current users of controlled substances. Under the ADA, current illegal users of controlled substances are expressly excluded from the definition of person with a disability and are therefore not protected by the ADA. Employers are not prohibited by the ADA from taking adverse employment actions against employees for detected drug use. Consistent with this approach, the FHWA rules simply do not contemplate the consequences of drug use on the employment relationship.

Employers may prohibit the use of drugs on the job under the ADA, which is also consistent with FHWA prohibitions. Finally, though there is no conflict between the ADA and FHWA rules, the EEOC guidelines provide that it is a defense to a charge of discrimination under the ADA that a challenged action is required by other Federal law or regulation, such as the FHWA rules on controlled substances.

Section 382.713 Requirement for Notice

This section is similar to proposed § 382.113 which provides that prior to subjecting a driver to a controlled substances test in accordance with these proposed rules, the motor carrier or Federal, State or local official must notify the driver that the test shall be performed in accordance with these proposed rules. No motor carrier shall misrepresent that a test is being performed pursuant to this part. Motor carriers or their agents shall not use the Federal standard custody and control form for testing which is not required by any Federal agency. If this form is used, it shall be a violation.

Section 382.715 Starting Date for Controlled Substances Programs

The implementation schedule proposed is consistent with the schedule used in the November 21, 1988, final rule for controlled substances testing and is the same as proposed § 382.115 for alcohol testing programs. The FHWA is proposing to allow approximately one year from the effective date for larger carriers and approximately two years for smaller carriers. The number of drivers a motor carrier is using on the effective date of the final rule will be the factor used to determine if a carrier is large or small. Fifty or more drivers will designate a motor carrier as large and less than 50 drivers will designate a motor carrier as small for the purposes of implementing the requirements of this rule. The FHWA is eliminating application of the term "drivers subject to testing" as used in the November 21, 1988, final rule.

The FHWA believes that a one year period is sufficient time to implement the controlled substances testing requirements, including the changes contained in part 40 as proposed in today's **Federal Register**, in the operations of these larger motor carriers without any significant economic or operational burdens. Motor carriers that are currently testing drivers in accordance with 49 CFR part 391, subpart H may implement these proposed regulations on or after the effective date of the final rule, but no later than the starting date delineated in this section.

Subpart H—Prohibitions and Consequences

Section 382.801 Controlled Substances Use

The FHWA currently has very stringent controlled substances use prohibitions in the FMCSRs. These prohibitions, which apply to both

drivers of CMVs and motor carriers, are being revised and included in this section and § 382.803. Drivers shall be prohibited from using controlled substances.

Section 382.803 Controlled Substances Testing

As stated in proposed § 382.801, this prohibition applies to both drivers of CMVs and motor carriers. As with § 382.801, drivers shall also be prohibited from testing positive for controlled substances while driving commercial motor vehicles. This requirement is directly from the Omnibus Act, which requires a testing program to determine if a CMV driver has used a controlled substance in violation of law or Federal regulation.

Section 382.805 Refusal to Submit to a Required Controlled Substances Test

This section, which is similar to proposed § 382.211, provides that drivers shall not refuse to submit to required tests and that the motor carrier shall not permit a driver who refuses to be tested to perform safety-sensitive functions.

Subpart I—Controlled Substances Tests Required

The FHWA is not proposing to require periodic testing. The Act gives the Secretary such discretion only for this type of testing. Based upon the FHWA's experience with controlled substances testing, the FHWA has decided to eliminate periodic testing upon the effective date of this rule. The current controlled substances testing regulations allow motor carriers to discontinue periodic testing for a driver when that driver has had one pre-employment, one periodic, or one random test and the motor carrier is randomly testing at a 50 percent testing rate. It is FHWA's understanding that many carriers are indeed discontinuing periodic testing for controlled substances after the driver has had one of these tests. The FHWA believes the other types of testing will adequately detect and deter controlled substances use. Therefore, the FHWA is proposing to eliminate periodic testing for the use of controlled substances.

The sections for pre-employment/pre-duty, post-accident, random, reasonable suspicion, return-to-duty, and follow-up testing listed below are similar to the alcohol testing sections, §§ 382.301 through 382.311, published elsewhere in today's **Federal Register**.

Section 382.901 General

Proposed § 382.901(a) is identical to the current § 391.97(d). Proposed paragraph (b) requires all controlled substances testing specimens collected to use the "split sample" collection procedure (49 CFR part 40). This provision is mandated by the Omnibus Transportation Employee Testing Act (Pub. L. 102–143).

Section 382.903 Pre-Employment/Pre-Duty Testing

Motor carriers shall test for controlled substances use drivers or driver-applicants it intends to hire or use, prior to the first time the driver operates a CMV. The motor carrier may not use the driver unless and until the result of the test is negative.

An exception from the testing requirement will be allowed if the driver has had a prior pre-employment controlled substances test performed under this subpart or another DOT agency rule in the past six months which indicated a negative test result and has had no subsequent verified positive test results.

Section 382.905 Post-Accident Testing

The FHWA is strongly committed to ensuring that drivers who are involved in an accident are tested for the use of controlled substances. The Act requires FHWA to test for controlled substances each commercial motor vehicle operator who was involved in an accident in which there was loss of any human life. The FHWA is proposing to use this requirement plus a requirement that any accident in which a motor vehicle is required to be towed away from the accident scene and the driver receives a citation for a moving violation of a State or local traffic law, a post accident test is required to be performed. This additional criteria is currently required in the existing 49 CFR part 391, subpart H, except for the motor vehicle involved in an accident, and required to be towed away from the accident scene which will replace the amount of property damage criterion.

Post accident testing may have to be performed not only when an accident occurs while the driver is actually driving a commercial motor vehicle, but also, in an accident involving a fatality, when the driver is performing a safety-sensitive function. For instance, a driver parks a truck improperly, on the travelled portion of the highway. Another motorist collides with the truck and the motorist is killed. The driver of the truck will be required, by this rule, to be tested for controlled substances. Post-accident testing must also be performed when the driver receives a citation arising from the accident.

The FHWA is proposing that drivers must be tested as soon as possible, but within eight hours of the accident. The FHWA has received a recommendation from the National Transportation Safety Board to shorten the time frame for post-accident testing. For this reason, the FHWA proposes to require a test within a shorter time frame than the current rule. However, in the event, for valid reasons (as documented by the motor carrier) the test can not be conducted within the eight-hour time frame, the driver must be tested as soon as possible, but prior to twenty-four hours elapsing. Failure to complete a test on a driver within the prescribed twenty-four hours following an accident would be justifiable only if valid reasons (as determined by FHWA) can be documented. After the twenty-four hour, the motor carrier should cease all attempts to take a urine specimen for a controlled substances test and must document why the test could not be submitted.

Valid reasons would include, but are not limited to, securing hazardous materials loads, providing first-aid treatment, assisting in securing the accident site, being detained or arrested by law enforcement officials and a driver who has a ureterosigmoidostomy or is unconscious. A driver would also be prohibited from driving a CMV for a minimum of one year if the driver refused to be tested.

Although stated in general terms in subpart L of this proposal, the FHWA believes that a statement that motor carriers be required to provide drivers with the necessary post-accident procedures and instructions prior to operating a CMV, on a continuous basis, be made within the body of this section. Additionally, motor carriers would be required to maintain the information relating to the controlled substances test or the need for a test, if one was not performed. This information would include the valid reasons when a test was not performed under the recordkeeping requirements in § 382.1013 of this proposed rule.

The FHWA proposes in § 382.905(f) to allow tests done by Federal, State or local officials having independent authority to require controlled substances tests to meet the requirements of this section if the results of the test are obtained by the motor carrier and the testing was performed in conformance with the applicable Federal, State or local requirements for controlled substances testing. This means that if a National Park Service Police officer, State Highway Patrol officer, municipal police officer, or similar official has independent authority to require a controlled substances test after an accident, this test may be deemed as a

completed test by the motor carrier if the official used an approved or applicable testing methodology for his/her jurisdiction and the motor carrier obtains the results of the test. This will allow motor carriers to accept tests done by law enforcement officials, such as, but not limited to, blood tests, saliva tests, or hair tests when these tests are approved in the jurisdiction of the law enforcement official and the results are for the NIDA-five controlled substances and at the 49 CFR part 40 cutoff levels.

§ 382.907 Random Testing

The FHWA is proposing random testing that is similar to the current requirements of 49 CFR part 391 subpart H. The FHWA is proposing that the testing rate will remain the same as subpart H at 50 percent of the number of driver positions used by the motor carrier. A motor carrier's driver positions are determined by how many drivers the motor carrier has on average during a one year period. If the motor carrier's driver population fluctuates, the FHWA expects motor carriers to adjust their random selections based on the number of drivers in a testing cycle.

The motor carrier would select drivers for testing at various times and would ensure that the selection was based on statistically-valid methods. The driver selected would be notified only when he/she would be able to provide a urine specimen immediately upon notification. That is, the driver, once notified, would proceed directly to the collection site and provide a specimen without performing further work or taking any other actions which do not lead to the submission of the specimen.

The motor carrier must spread testing reasonably throughout a 12 month period. Medium and large carriers, those with seven or more drivers, must select driver's names at least once each quarter under the current drug regulations. The FHWA will expect similar performance under this proposal. Also motor carriers must ensure that each driver has an equal chance of being tested during the selection of driver's names.

The FHWA has had many inquiries from owner-operators and the public on how owner-operators comply with the random testing requirements. It has been the Department of Transportation's view that owner-operators are not allowed to have a random testing program on their own. Owner-operators must meet the conditions of random testing, which include that the random selection process be unannounced. The FHWA believes that the requirement of unannounced testing requires that an owner-operator must join a consortium, group or have a neutral, unbiased third party select a date for testing and the third party keeps the date confidential from the driver until that date arrives. Owner-operators, under this proposal, will be expected to perform the same type of random selection process.

Section 382.911 Reasonable Suspicion Testing

The term "reasonable suspicion" is defined as "the actions, appearance, behavior, conduct, speech or body odors of a driver contemporaneous with the operation of a CMV which are indicative of the use of controlled substances." As with the current controlled substances testing requirements, unless it is not feasible, at least one supervisor or motor carrier official must make the required observations. The person making the observations and determining that the driver must be tested for controlled substances use must be trained in detecting the symptoms of controlled substances use. The observations must be documented and signed by the observers within 24 hours of the observation. A copy of the documentation shall be attached to the results of the test and retained for a minimum of one year.

Section 382.913 Return-to-Duty Testing

This proposed section requires the motor carrier to conduct return-to-duty testing after a violation of this part and prior to allowing the driver to drive a commercial motor vehicle. A motor carrier is required to test a driver who has violated any of the controlled substances prohibitions in subpart H of this part prior to that driver again performing safety-sensitive functions, such as driving a commercial motor vehicle.

Section 382.914 Follow-Up Testing

This section requires testing after a determination by a substance abuse professional that the driver is in need of assistance (rehabilitation), but that such testing cannot exceed five years and is in addition to the other types of testing. The SAP may discontinue the testing at any time after the required six follow-up tests.

Section 382.915 Exceptions for Testing Performed by Consortiums

This section provides that pre-employment/pre-duty testing and random testing need not be performed directly by the motor carrier provided that the motor carrier directs or approves such testing program prior to using a driver participating in the program. The FHWA recognizes the high driver turnover rate in the motor carrier industry and believes that the provisions of this proposed section will minimize additional unnecessary tests while ensuring that drivers who use controlled substances while operating a CMV or on duty are identified and prohibited from performing safety-sensitive tasks.

The proposed conditions under which a motor carrier may use a driver without testing the driver for pre-employment/pre-duty are similar to the conditions presently included in 49 CFR 391.103. The information that a motor carrier is to obtain from a third-party testing service provider is similar to that contained in 49 CFR 391.103 and 391.109.

Section 382.917 Split Sample Testing

This proposed section sets forth the driver's rights regarding the testing of a subdivided portion of the driver's specimen upon a verified positive test result. The Omnibus Act gives a driver who has tested positive the right to request that the split sample be tested at a different laboratory. The Act does not specify who is to choose the laboratory and who is to pay for the test. The proposed paragraph gives the driver the right to request a different laboratory to test the secondary split sample. The FHWA is restating that the request for testing the split sample must be made within 72 hours of being notified that the original sample is verified as positive. This time period is required by 49 CFR part 40. The FHWA believes, though, that it must be restated in this section because many drivers do not have copies of 49 CFR part 40 and this provision is important to them. The driver has, by this regulation, up to 72 hours to request the secondary sample be tested to confirm the presence of the controlled substance(s) identified in the primary split samples test. A motor carrier or its agent, the medical review officer, may allow a longer time period. Regardless of whether the driver requests a test of the secondary split sample, all consequences shall begin as soon as the verified positive is reported to the driver. If the test is canceled, the consequences shall cease at that time. The source of payment for the analysis of the split sample test is not provided, but is a labor/management issue.

The FHWA will require that a motor carrier report to FHWA instances in which a verified positive test result is converted to a canceled test because the split sample result is negative. The report will be made to the FHWA's Regional Director, Office of Motor Carriers for the region in which the motor carrier has its principal place of business. The regional and division

offices of the Office of Motor Carriers enforce and implement the controlled substances testing regulations. For this reason, motor carriers must keep the local offices informed of any problems they are having with the procedures or regulations. The FHWA does not expect many instances where these reports will be necessary, since the FHWA has never been informed of such an event occurring under the current regulations, which allow, but do not require, motor carriers to perform split sample testing. The reports will assist the FHWA and DOT in quality control assessments.

Section 382.919 Canceled Tests

This section specifies when a resubmission of a canceled test is required and when it is prohibited. Many motor carriers performing testing under the current rules believe that when a random test is canceled by the laboratory and/or the medical review officer that a driver must submit a new specimen for testing. This is not correct. Only pre-employment, return-to-duty and reasonable suspicion tests, where reasonable suspicion is still documentable, must be conducted again. Like random tests, post-accident tests which are canceled, must not be redone.

Random and post-accident testing are deterrent aspects of the controlled substances testing program. The FHWA believes that the acts of submission of urine for testing are themselves deterrents to controlled substances use. This is not to say that the FHWA condones only submission of urine under the random or post-accident testing requirements without the laboratory and medical review officer functions also taking place. The FHWA, though, believes that a cancellation of a test by the laboratory under its criteria for cancellation of tests should not subject a driver to a resubmission for that test. The random or post accident test would be recorded as having been performed, but that a canceled result was obtained.

Under existing regulations, a canceled test may be corrected by certain administrative procedures. This will continue under 49 CFR part 40. Additionally, part 40 allows employers or motor carriers to directly observe the next required FHWA or DOT controlled substances test, when certain criteria have been met which indicate a possible adulteration of the previous specimen. These criteria are precise and must be followed when a motor carrier chooses to perform a direct observation of a driver urinating.

Subpart J—Notification of Controlled Substances Test Results and Recordkeeping

This subpart identifies the various notifications and recordkeeping requirements between each party: Motor carrier; laboratory; medical review officer; driver and substance abuse professional.

Section 382.1001 Laboratory Notifications

Proposed § 382.1001 requires laboratories to notify medical review officers, in accordance with the procedures set forth in 49 CFR part 40.

Section 382.1003 Medical Review Officer Notifications to the Tested Individual

The FHWA is proposing to continue to afford drivers who have tested positive for controlled substances the opportunity to discuss a positive test result and present to the medical review officer the affirmative defense that the driver's use of the controlled substance(s) was prescribed by a licensed health care professional. This section is similar to the current § 391.97. The medical review officer contacts the driver after a confirmed positive test for this reason. When the medical review officer is unable to contact a driver directly after a confirmed positive test finding, the motor carrier will be contacted by the medical review officer and will be required to instruct the driver to contact the medical review officer prior to the driver being dispatched, going on duty, or continuing on duty. Many medical review officers have informed FHWA and the Office of the Secretary of Transportation in various forums that drivers often do not contact them immediately. The provision that a driver must contact the medical review officer prior to performing a safety-sensitive function is added to assist medical review officers in reviewing the results quicker and reducing the time necessary to verify a test as negative or positive.

Medical review officers have also reported to FHWA that many drivers leave the motor carrier's employ or never join the motor carrier's work force after submission of a urine specimen. This greatly reduces the medical review officer's ability to contact the driver and verify the test result. Motor carriers will, therefore, be expected to make reasonable efforts to contact a tested driver, to allow the individual to provide an alternative medical explanation to the medical review officer and be referred to a substance abuse professional if the test is verified as positive.

Section 382.1005 Medical Review Officer Notifications to the Motor Carrier

Proposed § 382.1005 requires medical review officers to notify motor carriers of the results of a controlled substances test. An initial notification may be made orally and/or by electronic transmission, but in all cases a written notification must be forwarded to the motor carrier within 3 business days. Medical review officers would also be required to report to the motor carrier the medical review officer's inability to contact a driver to discuss possible alternative medical explanations as an affirmative defense for the use of a controlled substance.

Section 382.1007 Motor Carrier Notifications

This section proposes that motor carriers would be required to notify driver-applicants of the results of pre-employment tests, if the driver requests the results within 60 days after the driver is notified about the disposition of the employment application. This section also proposes that drivers be notified after any other type of test required by subpart I of this proposal.

Motor carriers would also be required to notify drivers when the medical review officer has contacted a designated management official due to an inability to contact the driver directly. As a follow up, motor carriers must notify the medical review officer that the driver has been contacted and has been instructed to contact the medical review officer.

Section 382.1009 Laboratory Recordkeeping and Record Retention

The FHWA is well aware of the paperwork burdens associated with this proposed rule and has analyzed the need for every document required to be collected and retained. The FHWA is describing the documents which must be maintained in very general terms, allowing motor carriers and their agents (laboratories, medical review officers and third party service providers) to customize the documents to fit their particular operation. The documents may be maintained electronically and shall be made available to the FHWA in written form upon demand.

Section 382.1011 Medical Review Officer Recordkeeping and Record Retention

Section 382.1011 proposes the medical review officer's recordkeeping and record retention requirements.

Section 382.1013 Motor Carrier Record Retention

Section 382.1013 proposes a motor carrier's requirements for recordkeeping.

Section 382.1015 Reporting of Results in a Management Information System

The FHWA, along with the other DOT agencies, is proposing to establish a management information system (MIS) to obtain and analyze the controlled substances testing program and alcohol testing program information. This section sets forth the requirements for this system.

Elsewhere in today's **Federal Register** is a parallel "MIS" NPRM regarding 49 CFR part 40 and 49 CFR part 391, subpart H. The preamble to the 49 CFR part 40 NPRM contains many comments, discussions and questions that should be considered in reviewing this NPRM. Your comments on this NPRM should indicate that you are responding to questions or comments found in the generic NPRM under 49 CFR part 40, this specific NPRM (FHWA Docket No. MC–92–23, the alcohol testing NPRM (FHWA Docket No. MC–92–19), or the NPRM for changing 49 CFR part 391, subpart H (FHWA Docket No. MC–93–2).

Section 382.1017 Access to Individual Records

The FHWA is proposing that all records prepared in response to this proposed rule be maintained in a secure and confidential manner. No person may release information on an individual test, or other information pertaining to a violation of this part which is attributed to an individual, unless such a specific release is authorized by the tested individual, required by law or otherwise expressly authorized by this part. This proposal will provide for adequate security and confidentiality of test results and other information.

The FHWA is further proposing to require that a driver have access to the driver's records upon written request. This proposal is in addition to the requirement that a driver be notified of the results of a test.

Proposed paragraph (f) requires a motor carrier to make available to another motor carrier, upon written request of a driver, the information requested by the driver regarding the driver's participation in the motor carrier's controlled substances testing program. The FHWA believes this proposed requirement will provide the motor carrier, wishing to hire/use a driver who has previously driven for another motor carrier subject to this part, with the necessary information regarding the driver's participation in the program of the previous motor carrier. This paragraph complements the existing requirements in 49 CFR 383.35 and 391.23. These sections require a motor carrier to check previous employment of a person it intends to hire/use as a driver of a commercial motor vehicle.

The FHWA would like to receive comments regarding whether a driver may be required as a condition of employment to provide a signed authorization allowing the new motor carrier to obtain results from prior tests performed by the driver's preceding employing motor carriers. The FHWA recognizes that a problem exists in the industry with drivers who, after testing positive for controlled substances, seek employment with another motor carrier without informing the hiring motor carrier of the previous tests. This problem is exacerbated by the high turnover rate of drivers in the industry. The FHWA has received numerous comments and suggestions from interested parties in favor of requiring drivers to release previous tests for controlled substances to a hiring motor carrier. The FHWA is seeking comments on the feasibility of these suggestions for controlled substances test results.

This section requires a motor carrier to release all information relating to this part and permit access to all facilities utilized in complying with this part when requested by the FHWA, another DOT agency, the Secretary of Transportation or State or local officials with regulatory authority over the controlled substances use program of a motor carrier. The facilities may include collection sites, record storage areas and the offices and records of substance abuse professionals (SAP). In addition, information relating to an accident under investigation by the National Transportation Safety Board (NTSB) shall be released to the NTSB when so requested.

Section 382.1017(d) imposes on medical review officers the requirement that medical review officers make available copies of all test results and other records pertaining to the motor carrier's controlled substances misuse prevention program, when requested by appropriate government agencies. This represents a change from the current rule in part 391, subpart H, which imposes such a requirement only on motor carriers. Direct access to medical review officer records is being proposed in response to comments from motor carriers and medical review officers administering current controlled substances testing programs. Many medical review officers have expressed a desire to report positive test results directly to FHWA, but feel constrained by the lack of a provision expressly authorizing such release. Such a reporting mechanism could be an important check on motor carriers who do not retain records of positive test results.

As an agent of the motor carrier, the medical review officer is subject to the access requirements imposed expressly on the motor carrier. As the rule is currently written, however, there may also be some justification for treating the medical review officer and the motor carrier as different entities in regard to release of information. See, *e.g.*, 49 CFR 391.89(a), medical review officer access provisions; 49 CFR 391.89(b), motor carrier access provisions. In any event, FHWA currently may obtain medical review officer generated information on positive test results through access to motor carriers records. Obtaining the information directly from the medical review officer would raise no additional privacy considerations for the driver, and would serve as an effective aid in enforcement. This may prove particularly important given the additional consequences for positive test results in the proposed rule. Because evaluation, rehabilitation and driving prohibition periods will result from positive tests under the proposed rule, there will be an even greater incentive on the part of motor carriers to not retain reports of positive results.

It is not being proposed to expressly permit access to medical review officer facilities utilized in complying with the rule, only to medical review officer records. Access to facilities would not aid in solving the problem of motor carriers ignoring positive test results and continuing to administer tests on the driver until a negative result is achieved, recorded and maintained.

The FHWA requests comments on this proposal expressly granting the FHWA access rights to medical review officer records. Are medical review officers reluctant to share the information directly with the FHWA under the current rule? What is the scope of the problem of motor carriers not retaining records of positive results? Will the proposed requirements solve the problem?

In responding to this issue, possible alternatives should be addressed in detail. For instance, reporting information to the FHWA by medical review officers could be made voluntarily. Commenters may also consider what specific items of medical review officer information, if not all,

should be made available to the FHWA. Perhaps only verified positive test results should be reported directly to the FHWA. Should medical review officers be allowed to report to the FHWA laboratory confirmed positive test results which are not verified as positive by the medical review officer? Medical review officers are not allowed under the current rules to report unverified positive test results to the motor carrier.

The FHWA is also proposing in paragraph (g) that a motor carrier may release information maintained under this part to certain individuals in a proceeding initiated by or on behalf of the driver. This paragraph will ensure that relevant facts relating to a person's use of controlled substances maintained by a motor carrier are made available in proceedings.

Subpart K—Consequences For Drivers Engaging In Controlled Substances-Related Conduct

§ 382.1101 Removal From Safety-Sensitive Function

This section is similar to § 382.501 of the proposed alcohol rule.

§ 382.1103 Required Evaluation

This section is similar to § 382.503 of the proposed alcohol rule.

§ 382.1105 Other Controlled Substances-Related Conduct

This section is similar to § 382.505 of the proposed alcohol rule.

§ 382.1107 Additional Consequences for Controlled Substances Violations

Section 5(f) of the Act directs the Secretary to determine appropriate sanctions for drivers who are determined to have used controlled substances through testing developed under this Act or used controlled substances in violation of law or Federal regulation, but are not under the influence of controlled substances as provided in the CMVSA. Regulations issued pursuant to the CMVSA impose disqualifications and penalties for driving under the influence of controlled substances, see § 383.51, and other controlled substances misuse, see § 392.5. These consequences are intended to rid the highways of drivers who continually violate alcohol misuse prohibitions and thereby pose a threat to the public.

When a violation of § 382.803 involving a verified positive controlled substances test result is identified by a motor carrier, the motor carrier would be prohibited from using the driver for the periods provided in the rule. The motor carrier would be required to document the violation, and both the motor carrier and the driver would be required to comply strictly with the consequences noted in this section, subject to the additional consequences in paragraphs (c) through (e) for failure to comply. There would be no licensing sanctions.

However, the current CDL disqualifications of one year for a first offense and lifetime for subsequent offenses upon conviction of operating a commercial motor vehicle while under the influence of a controlled substance remain applicable.

Proposed paragraph (b) prohibits a driver who refuses to be tested from driving any commercial motor vehicle for no less than one year. The FHWA believes that a strong disincentive to refuse to comply with this proposed rule is needed. This proposal is similar to the requirement of 49 CFR 383.51(b)(3)(i) which requires a driver who refuses to undergo alcohol testing required by a State or local jurisdiction under a probable cause determination to be disqualified for one year upon a conviction for such refusal.

Proposed § 382.1107(c) would require that motor carriers who knowingly use drivers who have violated these rules, will be subject to 49 U.S.C. 521(b) penalty provisions. These provisions provide for civil forfeiture penalties of up to $10,000 for violations of motor carrier safety regulations.

Proposed § 382.1107(d) prohibits a person found to have violated the controlled substances misuse prohibition and testing rules of another DOT agency from operating a CMV until the driver complies with the requirements of that DOT agency.

As explained above, subpart L of this proposed rule includes other actions which must be taken prior to a driver operating a commercial motor vehicle after having violated the prohibitions in §§ 382.801 through 382.805. These actions include an evaluation by the substance abuse professional and a finding that the driver has properly followed any instructions given. A driver needing assistance must also be tested for controlled substances use and the results must indicate a negative test result.

Proposed § 382.1107(e) prohibits drivers from driving a commercial motor vehicle following a fatal accident in which their controlled substances tests shows a verified positive test result. This prohibition is similar to the current drug rule in part 391, in which a driver is disqualified for one year following a positive drug test result after he or she is involved in a fatal accident. 49 CFR 391.117(b).

Table III indicates FHWA proposed consequences for violations of the proposed controlled substances prohibitions. Table IV indicates the post-accident testing requirements and additional penalties that would be imposed for prohibited actions during and after an accident.

TABLE III.—DRIVER CONTROLLED SUBSTANCES PROHIBITIONS AND CONSEQUENCES

First offense	Second offense within a three-year period	Third offense within a three-year period	Refusal to be tested
Consequences			
Professional Referral, and (*)	Professional Referral, 60-day driving suspension, and (*).	Professional Referral, 120-day driving suspension, and (*).	One year minimum driving prohibition and (*).

Prohibited Activities: Use or tests positive for controlled substances.
(*)—Driver must submit a urine specimen which has a negative result.

TABLE IV.—POST ACCIDENT CONTROLLED SUBSTANCES TESTING AND PENALTIES

[Testing Requirements—Controlled Substances Test: Within eight hours of accident]

	Penalties	
	No fatalities	Fatal accident
Refusal to submit to testing	One year suspension	One year suspension.

TABLE IV.—POST ACCIDENT CONTROLLED SUBSTANCES TESTING AND PENALTIES—Continued

[Testing Requirements—Controlled Substances Test: Within eight hours of accident]

	Penalties	
	No fatalities	Fatal accident
Leave accident scene prior to testing	One year suspension	One year suspension.
Verified positive test result:	(1) Professional Referral (2) 120 day driving suspension, and (3) Driver must submit a urine specimen which has negative result.	(1) Professional Referral. (2) One year suspension, and (3) Driver must submit a urine specimen which has a negative result.

Qualifying Accident: Any accident involving the death of a human being, or any accident in which the driver receives a citation for a moving traffic violation arising from the accident (as defined by State or local law), and (1) There was bodily injury requiring medical treatment away from the accident scene, or (2) One or more motor vehicles incurred disabling damage as a result of the accident and must be transported away from the scene by a tow truck or other motor vehicle.

Section 382.1109 Disqualifications

As stated above, the penalty provisions of the CDL regulations are not affected in any way by this proposed rule. The authority of State and local officials to implement the disqualifications included in 49 CFR part 383 are not affected by this proposed rule. Drivers found by Federal, State or local officials to be driving under the influence of controlled substances will be subject upon conviction to disqualifications of from one year to lifetime under § 383.51(b).

Subpart L—Controlled Substances Misuse Information, Training, and Referral

Section 382.1201 Motor Carrier Obligation To Promulgate a Policy on the Misuse of Controlled Substances

This section proposes that motor carriers provide drivers with sufficient information regarding the motor carrier's controlled substances use program. The FHWA is proposing, as a minimum, that at least ten specific items be included in the materials a motor carrier makes available to its drivers.

Though the form of this material is not specified in the proposed rule, the materials must be available to all drivers at all times. Therefore, while the material may initially be presented to drivers in a course/seminar setting, the FHWA anticipates that the material will also be posted or otherwise made available to drivers on a continuing basis and updated as necessary to reflect current information and procedures.

Section 382.1203 Training for Supervisors and Company Officials

This section requires that persons who may make determinations regarding reasonable suspicion testing must receive a minimum of 60 minutes of training prior to making any such determinations. The content of the training, i.e., course outlines, instructor's materials, participant's materials, video tapes, etc. must be maintained by the motor carrier. In addition, the motor carrier must also maintain a list of all supervisors and company officials who have taken the training and the date(s) they received the training.

Section 382.1205 Referral, Evaluation, and Treatment

Refer to the Office of the Secretary's Common Preamble for a detailed discussion of this section. This section is identical to proposed § 382.605 in a companion rulemaking on alcohol testing in today's **Federal Register**.

VII. Regulatory Analyses and Notices

Regulatory Impact Analysis

This proposed rule will require motor carriers to test drivers for the use of controlled substances. This rule will affect trucking companies, passenger carriers, State and local governments and anyone who operates a commercial motor vehicle on the public highways.

Executive Order 12291 (Federal Regulation) and DOT Regulatory Policies and Procedures

The FHWA has determined that this document is a major rule under Executive Order 12291 and a significant regulation under the regulatory policies and procedures of the DOT. A draft regulatory impact analysis has been prepared and a copy has been placed in the docket. A summary is included here.

Economic Impact Analysis

The Act requires among other things, testing of safety-sensitive employees in the highway industry for use of controlled substances in violation of the law or Federal regulations. The Act specifically mandates privacy in collection techniques, testing safeguards, confirmation of positive results, confidentiality of test results and scientific random selection of employees for testing. The Act further mandates pre-employment, random, post-accident, and reasonable suspicion testing.

Within the framework of these legislative mandates the FHWA is proposing a controlled substances testing program that minimizes the economic impact to the industry by utilizing established procedures, equipment, techniques, and safeguards that are already available to employers. The proposed rule will not require the development of new technologies, or the need to create an extensive cadre of testing personnel. In the majority of cases, an employer's controlled substances testing program will be an incremental expansion of existing drug testing programs, utilizing the same facilities, personnel, and records systems that currently exist.

The following summarizes the preliminary industry cost and benefit evaluation for the final rule on controlled substances testing. The rule is intended to prohibit absolutely controlled substances when operating a commercial motor vehicle. The rule will require pre-employment/pre-duty, random, post-accident, reasonable suspicion, and return-to-duty controlled substances testing for approximately 5,000,000 drivers of commercial motor vehicles.

The economic cost to the motor carrier industry will be substantial and include, in addition to the cost of the test, the cost of administering a testing program, the cost of replacement drivers, the occasional court cost, and for owner-operators the potential loss of livelihood.

Notwithstanding these costs to the motor carrier industry, the FHWA believes that substantial benefits exceeding the costs will accrue as a result of this proposal. There will be benefits due to the prevention of fatalities, personal injuries, property damage, and lost productivity resulting from accidents attributed to neglect or error on the part of commercial motor vehicle drivers whose judgment or motor skills were diminished by the use of controlled substances. Benefits will

also accrue from a reduction in absenteeism and pilferage.

The assumptions and cost factors used in preparing the economic impact estimate have been developed by the FHWA. This regulatory impact analysis is in the docket for this rulemaking and is subject to review. Cost data were furnished by motor carriers, motor carrier industry associations, and trade publications.

The benefit cost analysis is a direct arithmetic comparison between the identified and quantified cost of a controlled substances testing program and the economic value of the benefits expected to be derived therefrom. The preliminary cost-benefit analysis is for a ten year period beginning with 1993; assumes a random testing rate of 50 percent, a deterrence rate of 70 percent the first year, then gradually increasing to approximately 95 percent.

The estimated total cost consists of: setting up and administrating a testing program, the cost of pre-employment, random, post accident, reasonable suspicion, and follow-up testing. Costs were estimated using the cost of a testing program for all types of testing operated exclusively by motor carriers and their testing contractors.

The estimated value of the benefits is the cost associated with projected reduction in commercial motor vehicle accidents by the assumed 5 percent of drivers that will have used controlled substances and includes fatalities, injuries, property damage, traffic delays, and emergency services that will not occur by removing or deterring these drivers from the highways. Additional benefits will also result from the reduction in absenteeism and pilferage.

Summary of Benefits and Costs

Costs and benefits are total for the 10 year analysis period in assumed 1993 dollars, based on a 50 percent random testing rate.

Controlled substances testing program	Random testing rate	10 year benefits (billions)	10 year costs (billions)	Benefit cost ratio
Motor Carrier	50%	$42.55	$2.39	17.79

In other words for every $1.00 spent on this testing program there would be returned in benefits $17.79.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354), the FHWA has evaluated the effects of this rulemaking on small entities. This final rule would require motor carriers to test drivers for the use of controlled substances. It will have a significant adverse economic impact on small entities. Because the Omnibus Act mandates controlled substances testing irrespective of the size of the entities, the FHWA is unable to lessen the economic impact on them.

For these reasons, the FHWA hereby certifies that this action will have a significant economic impact on a substantial number of small entities.

Executive Order 12612 (Federalism Assessment)

This proposal adds part 382 of the FMCSRs pertaining to testing for controlled substances by drivers of commercial motor vehicles operating in commerce on public roads and highways. These proposed requirements directly affect motor carriers and the drivers for these motor carriers. This document preempts State or local laws and regulations that are inconsistent with this proposed rule, as required by the Omnibus Transportation Employee Testing Act of 1991. Therefore, the agency does not have to prepare a Federalism Assessment for this proposal.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.217, Motor Carrier Safety. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.

Paperwork Reduction Act

The information collection requirements in part 382, subpart J of this rule have been submitted to the Office of Management and Budget for approval under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*

National Environmental Policy Act

The agency has analyzed this action for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and has determined that this action would not have any effect on the quality of the environment.

Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects in 49 CFR Part 382

Controlled Substances, Highways and roads, Highway safety, Motor carriers, Motor vehicle safety, Hours of service.

Issued on: December 2, 1992.

T. D. Larson,

Administrator.

Andrew Card,

Secretary of Transportation.

In consideration of the foregoing, the FHWA proposes to amend title 49, Code of Federal Regulations, subchapter B, chapter III, as set forth below:

1. Chapter III is amended by adding subparts G, H, I, J, K and L of part 382 as proposed elsewhere in this separate part of today's **Federal Register** as follows:

Part 382—CONTROLLED SUBSTANCES AND ALCOHOL USE AND TESTING

Subpart G—Controlled Substances Use And Testing

Sec.

382.701 Purpose.
382.703 Applicability.
382.705 Controlled substances testing procedures.
382.707 Definitions.
382.709 Preemption of State and local laws.
382.711 Other requirements imposed by motor carriers.
382.713 Requirement for notice.
382.715 Starting date for controlled substances testing programs.

Subpart H—Prohibitions and Consequences

382.801 Controlled substances use.
382.803 Controlled substances testing.
382.805 Refusal to submit to a required controlled substances test.

Subpart I—Controlled Substances Tests Required

382.901 General.
382.903 Pre-employment/pre-duty testing.
382.905 Post-accident testing.
382.907 Random testing.

382.909 [Reserved]
382.911 Reasonable suspicion testing.
382.913 Return-to-duty testing.
382.914 Follow-up testing.
382.915 Exceptions to testing performed by consortiums.
382.917 Split sample testing.
382.919 Canceled tests.

Subpart J—Notification of Controlled Substance Test Results and Recordkeeping

382.1001 Laboratory notifications.
382.1003 Medical review officer notifications to the tested individual.
382.1005 Medical review officer notifications to the motor carrier.
382.1007 Motor carrier notifications.
382.1009 Laboratory recordkeeping and record retention.
382.1011 Medical review officer recordkeeping and record retention.
382.1013 Motor carrier record retention.
382.1015 Reporting of results in a management information system.
382.1017 Access to individual records.

Subpart K—Consequences for Drivers Engaging in Controlled Substances-Related Conduct

382.1101 Removal from safety-sensitive function.
382.1103 Required evaluation.
382.1105 Other controlled substances-related conduct.
382.1107 Additional consequences for controlled substances violations.
382.1109 Disqualifications.

Subpart L—Controlled Substances Use Information, Training, And Referral

382.1201 Motor carrier obligation to promulgate a policy on the misuse of controlled substances.
382.1203 Training for supervisors and company officials.
382.1205 Referral, evaluation, and treatment.

Authority: 49 U.S.C. app. 2505; 49 U.S.C. app. 2701 *et seq.*; 49 U.S.C. 3102; 49 CFR 1.48.

* * * * *

Subpart G—Controlled Substances Use and Testing

§ 382.701 Purpose.

(a) The purpose of this subpart is to reduce highway accidents that result from driver use of controlled substances, thereby reducing fatalities, injuries and property damage.

(b) Subparts G through L prescribe minimum Federal safety standards to deter the use of controlled substances as defined in part 40 of this title (marijuana, cocaine, opiates, amphetamines and phencyclidine (PCP).

§ 382.703 Applicability.

(a) This part applies to all motor carriers and drivers as defined in this part who are required under part 383 of this chapter to obtain a commercial driver's license, except for motor carriers and their drivers who are required to conform to the controlled substances testing requirements of the Federal Transit Administration of the Department of Transportation found in part 653 of this title or have obtained a full waiver or State option waiver from the part 383 requirements.

(b) An owner-operator motor carrier who employs himself/herself as a driver must comply with both the rules in this part that apply to motor carriers and the rules in this part that apply to drivers.

(c) The requirements of this part do not apply to any employee whose place of reporting or point of departure (home terminal) for motor carrier transportation services is located outside the territory of the United States.

§ 382.705 Controlled substances testing procedures.

Each motor carrier shall ensure that all controlled substances testing conducted under this part complies with the procedures set forth in part 40 of this title. The provisions of part 40 of this title that address controlled substances testing are incorporated by reference and are made applicable to motor carriers by this part.

§ 382.707 Definitions.

Words or phrases used in this part are defined in § 390.5 of this chapter, except as provided herein—

Accident means an occurrence involving a commercial motor vehicle engaged in the operations of a motor carrier who is subject to this part resulting in:

(1) The death of a human being; or

(2) Bodily injury to a person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident; or

(3) One or more motor vehicles incurring disabling damage as a result of the accident and transported away from the scene by a tow truck or other motor vehicle.

Canceled test means that a test was not performed by a Department of Health and Human Services, National Institute on Drug Abuse (NIDA) certified laboratory or the medical review officer determines that a procedural error or adulteration occurred which invalidates the test result.

Collection site means a place where individuals present themselves for the purpose of providing urine specimens to be analyzed for specified controlled substances. The site must possess all necessary personnel, materials, equipment, facilities, and supervision to provide for the collection, security, temporary storage, and transportation or shipment of the samples to a laboratory.

Commerce means (1) any trade, traffic or transportation within the jurisdiction of the United States between a place in a State and a place outside of such State, including a place outside of the United States and (2) trade, traffic, and transportation in the United States which affects any trade, traffic, and transportation described in paragraph (1) of this definition.

Commerial motor vehicle means a motor vehicle or combination of motor vehicles used in commerce to transport passengers or property if the motor vehicle—

(1) Has a gross combination weight rating or gross combination weight of 26,001 or more pounds inclusive of a towed unit with a gross vehicle weight rating or gross vehicle weight of more than 10,000 pounds; or

(2) Has a gross vehicle weight rating or gross vehicle weight of 26,001 or more pounds; or

(3) Is designed to or transport(s) 16 or more passengers, including the driver; or

(4) Is of any size and is used in the transportation of materials found to be hazardous for the purposes of the Hazardous Materials Transportation Act and which require the motor vehicle to be placarded under the Hazardous Materials Regulations (part 172, subpart F of this title).

Confirmed positive test means that the test a laboratory certified by the Department of Health and Human Services, National Institute on Drug Abuse (NIDA) has determined that one or more controlled substances was found in a specimen of human urine at or above the level specified in § 40.29 of this title.

Consortium means an entity, including a group or association of employers, motor carriers, or contractors, that provides controlled substances testing services as required by this part or other DOT alcohol testing rules and that acts on behalf of the employers.

Controlled substance or drug has the meaning assigned by 21 U.S.C. 802 and includes all substances listed on Schedules I through V as they may be revised from time to time (21 CFR part 1308).

Disqualification means either:

(1) The suspension, revocation, cancellation, or any other withdrawal by a State of a person's privileges to drive a commercial motor vehicle; or

(2) A determination by the FHWA, under the rules of practice for motor carrier safety contained in part 386 of this chapter, that a person is no longer

qualified to operate a commercial motor vehicle under parts 382 or 391 of this chapter; or

(3) The loss of qualification which automatically follows conviction of an offense listed in § 383.51; or

(4) The loss of qualification which automatically follows a violation of the controlled substances prohibitions as specified in this subchapter.

DOT Agency means an agency (or operating administration) of the United States Department of Transportation administering regulations requiring controlled substances testing (14 CFR parts 65, 121, and 135; 33 CFR part 95; 46 CFR parts 4 and 17; 49 CFR parts 199, 219, 382 and 653).

Driver means any person who operates a commercial motor vehicle. This includes, but is not limited to, full time, regularly employed drivers; casual, intermittent or occasional drivers; leased drivers and independent, owner-operator contractors who are either directly employed by or under lease to a motor carrier or who operate a commercial motor vehicle at the direction of or with the consent of a motor carrier. For the purposes of pre-employment/pre-duty testing only, the term driver includes a person applying to a motor carrier to drive a commercial motor vehicle.

Employer means a motor carrier and any other person designated in a DOT agency controlled substance rule as an employer.

FHWA means the Federal Highway Administration, U.S. Department of Transportation.

Health care professional means a person who is licensed, certified, and/or registered, in accordance with applicable State laws and regulations, to prescribe controlled substances. The term includes, but is not limited to, doctors of medicine (MD), doctors of osteopathy (DO), doctors of dental surgery (DDS), physician assistants, advanced practice nurses, and doctors of chiropractic.

Medical review officer or M.R.O. means a licensed doctor of medicine (M.D.) or osteopathy (D.O.) with knowledge of drug abuse disorders that is employed or used by a motor carrier to conduct drug testing in accordance with this part.

Motor carrier means any person (including the United States, a State, District of Columbia or a political subdivision of a State) who owns or leases a commercial motor vehicle or assigns persons to operate such a vehicle. The term *motor carrier* includes a motor carrier's agents, officers and representatives as well as employees responsible for hiring, supervising, training, assigning, or dispatching drivers and employees concerned with the installation, inspection, and maintenance of commercial motor vehicle equipment and/or accessories.

Negative test result means that a motor carrier's medical review officer has verified that a Department of Health and Human Services, National Institute on Drug Abuse (NIDA) certified laboratory's negative test result is accurate. A negative test result also means that there was not a sufficient quantity of any controlled substance in the specimen of human urine to meet the screening or confirmation levels specified in 49 CFR 40.29.

On-duty means all on duty time as defined in § 395.2, under *On-duty time*, of this subchapter and includes all time submitting urine specimens for controlled substances testing and performing any other functions contained in this part and in part 40 of this title with respect to controlled substances testing.

Performing (a safety-sensitive function) means a driver is considered to be performing a safety-sensitive function during any period in which he or she is actually performing, ready to perform, or immediately available to perform any of those on-duty functions set forth in § 395.2, under *On-Duty time*, (1) through (7) of this chapter.

Principal place of business means a single location designated by the motor carrier, normally its headquarters, where records required by parts 382, 387, 390, 391, 395, 396, 397 and 398 of this chapter will be maintained.

Refuse to submit to a test means that a driver failed or refuses to provide an adequate urine specimen without a valid medical explanation after he or she has received notice of the requirement to be tested in accordance with this part or engages in conduct that clearly obstructs the collection process. The notice of the requirement to be tested may be made by the motor carrier.

Safety-sensitive function means any of those on-duty functions set forth in § 395.2, under *On-duty time*, paragraphs (1) through (7) of this chapter.

Substance abuse professional means a licensed physician (Medical Doctor or Doctor of Osteopathy), or a licensed or certified psychologist, social worker, or employee assistance professional with knowledge of and clinical experience in the diagnosis and treatment of substances abuse disorders.

Verified positive test means that the test a motor carrier's medical review officer has determined that a Department of Health and Human Services, National Institute on Drug Abuse (NIDA) certified laboratory's confirmed positive test result is the result of prohibited controlled substances use.

§ 382.709 Preemption of State and local laws.

(a) Except as provided in paragraph (b) of this section, this part preempts any State or local law, rule, regulation, or order to the extent that:

(1) Compliance with both the State or local requirement in this part is not possible; or

(2) Compliance with the State or local requirement is an obstacle to the accomplishment and execution of any requirement in this part.

(b) This part shall not be construed to preempt provisions of State criminal law that impose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property, whether the provisions apply specifically to transportation employees (including drivers) or employers (including motor carriers) or to the general public.

§ 382.711 Other requirements imposed by motor carriers.

Except as expressly provided in this part, nothing in this part shall be construed to affect the authority of motor carriers, or the rights of drivers, with respect to the use of controlled substances, including authority and rights with respect to controlled substances testing and rehabilitation.

§ 382.713 Requirement for notice.

Before performing a controlled substances test under this part, each motor carrier shall notify a driver or driver-applicant that the controlled substances test is required by this part. No motor carrier shall falsely represent that a controlled substances test is administered under this part.

§ 382.715 Starting date for controlled substances testing programs.

(a) Large motor carriers. Each motor carrier with fifty or more drivers on [the effective date of the final rule] shall implement the requirements of this part on [date one year after the effective date of the final rule].

(b) Small motor carriers. Each motor carrier with fewer than fifty drivers on [the effective date of the final rule] shall implement the requirements of this part on [date two years after the effective date of the final rule].

(c) All motor carriers shall have a controlled substances misuse program that conforms to this part by [date two years after the effective date of the final rule] or by the date a motor carrier begins motor carrier operations, whichever is later.

Subpart H—Prohibitions and Consequences

§ 382.801 Controlled substances use.

Except as provided in § 382.901(a) of this part, no driver shall perform a safety-sensitive function, if the driver uses any controlled substances in violation of this part. No motor carrier having actual knowledge that a driver has used controlled substances shall permit the driver to perform a safety-sensitive function or continue to perform a safety-sensitive function.

§ 382.803 Controlled substances testing.

Except as provided in § 382.901(a), no driver shall report for duty, remain on duty or perform a safety-sensitive function, if the driver tests positive for controlled substances. No motor carrier having actual knowledge that a driver has tested positive for controlled substances shall permit the driver to perform or continue to perform safety-sensitive functions.

§ 382.805 Refusal to submit to a required controlled substances test.

No driver shall refuse to submit to a post-accident controlled substances test required under § 382.905, a random controlled substances test required under § 382.907, a reasonable suspicion controlled substances test required under § 382.911, or a follow-up controlled substances test required under § 382.914. No motor carrier shall permit a driver who refuses to submit to such a test to perform or continue to perform safety-sensitive functions.

Subpart I—Controlled Substances Tests Required

§ 382.901 General.

(a) This subpart does not prohibit a motor carrier from requiring a driver to notify the motor carrier of therapeutic or prescription controlled substance use.

(b) All controlled substances testing done in accordance with this part shall be performed using all part 40 of this title split sample collection procedures.

§ 382.903 Pre-employment/pre-duty testing.

(a) Prior to the first time a driver performs safety-sensitive functions for a motor carrier, the driver shall undergo testing for controlled substances. No motor carrier shall allow a driver to perform safety-sensitive functions unless the driver has been administered a controlled substances test with a negative test result.

(b) A motor carrier is not required to administer a controlled substance test as required by paragraph (a) of this section, if:

(1) The driver has undergone a pre-employment controlled substance test required by this subpart or the controlled substance testing rule of another DOT agency within the previous six months, with a negative test result; and

(2) The motor carrier ensures, by obtaining the information required by § 382.915(d), that no prior motor carrier of the driver of whom the motor carrier has knowledge has records of a violation of this part or the controlled substances misuse rule of another DOT agency within the previous six months.

§ 382.905 Post-accident testing.

(a) As soon as practicable following an accident involving a commercial motor vehicle, each motor carrier shall test for controlled substances each surviving driver:

(1) Who was performing safety-sensitive functions with respect to the vehicle, if the accident involved the loss of human life; or

(2) Who receives a citation under State or local law for a moving traffic violation arising from the accident.

(b) If a test required by this section is not administered within eight hours following the accident, the motor carrier shall prepare a written report to be kept in the motor carrier's files stating the reasons the test was not promptly administered. If a controlled substances test required by this section is not administered within 24 hours following the accident, the motor carrier shall cease attempts to administer a controlled substances test and shall prepare the report.

(c) A driver who is subject to post-accident testing who leaves the scene of an accident without a valid reason, except to submit to a test, may be deemed by the motor carrier to have refused to submit to testing. Nothing in this section shall be construed to require the delay of necessary medical attention for injured people following an accident or to prohibit a driver from leaving the scene of an accident for the period necessary to obtain assistance in responding to the accident or to obtain necessary emergency medical care.

(d) A motor carrier shall provide drivers with necessary post-accident information, procedures and instructions, prior to the driver operating a commercial motor vehicle, so that drivers will be able to comply with the requirements of this section.

(e) The results of any post accident tests for the use of controlled substances performed by Federal, State, or local officials having independent authority to require a driver to submit to a test, shall be considered to meet the requirements of this section provided such tests conform to applicable Federal, State or local requirements, and that the results of the tests for the controlled substances identified in part 40 of this title and cut-off levels required by this part are obtained by the motor carrier.

§ 382.907 Random testing.

(a) Each motor carrier shall, at various times, randomly select drivers for unannounced controlled substances testing. The selection of drivers shall be made by use of a scientifically valid method, such as a random-number table or a computer-based random number generator that is matched with drivers' Social Security numbers, payroll identification numbers, or other comparable identifying numbers. Each driver shall have an equal chance of being tested under the selection process used.

(b) During each 12-month period following the start of random controlled substances testing by the motor carrier, the motor carrier shall meet the following conditions:

(1) The dates for administering unannounced testing of randomly-selected drivers shall be spread reasonably throughout the 12-month period; and

(2) The number of drivers randomly selected for testing during the 12-month period shall be equal to an annual rate of not less than 50 percent of the total number of drivers subject to controlled substances testing under this part or the controlled substances rule of another DOT agency. If the motor carrier conducts random testing through a consortium, the annual rate may be calculated for each individual motor carrier or for the total number of drivers and DOT covered employees subject to random testing by the consortium.

(c) Each motor carrier shall require that each driver who is notified of selection for random testing proceeds to the testing site immediately. However, if the driver is performing a safety-sensitive function at the time of notification, the motor carrier shall instead ensure that the driver ceases to perform the safety-sensitive function and proceeds to the collection site as soon as possible.

§ 382.909 [Reserved]

§ 382.911 Reasonable suspicion testing.

(a) Each motor carrier shall require any driver to submit to a controlled substances test, when the motor carrier has reasonable suspicion to believe that the driver has violated the prohibitions in this part.

(b) The motor carrier's determination that reasonable suspicion exists to require the driver to undergo a controlled substances test shall be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the driver. The required observations shall be made by a supervisor or management official who is trained in detecting the symptoms of controlled substances use. The supervisor who makes the determination that reasonable suspicion exists shall not conduct the controlled substances test collection on that driver. Documentation of the driver's conduct shall be prepared and signed by the witnesses within twenty four hours of the observed behavior or before the results of the tests are released, whichever is earlier. A motor carrier shall ensure that the driver is transported immediately to a collection site for the collection of a urine specimen.

(c) Controlled substances testing is authorized by this section only if the observations required by paragraph (b) of this section are made during or just preceding the period of the work day that the covered driver is required to be in compliance with this part. A driver may be required to undergo reasonable suspicion testing for controlled substances while the driver is performing safety-sensitive functions; just before the driver is to perform safety-sensitive functions; or just after the driver has ceased performing such functions.

(d) As part of reasonable suspicion drug testing programs established pursuant to this section, motor carriers may test for drugs in addition to those specified in this part only with approval granted by the Federal Highway Administrator under part 40 of this title and for substances for which the Department of Health and Human Services has established an approved testing protocol and positive threshold.

§ 382.913 Return to duty testing.

Each motor carrier shall ensure that before a driver returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited by subpart H of this part, the driver shall undergo a return to duty controlled substances tests with a result indicating a negative test result.

§ 382.914 Follow-up testing.

Following a determination under § 382.1205(b) that a driver is in need of assistance in resolving problems associated with controlled substances use, each motor carrier shall ensure that the driver is subject to unannounced follow-up testing as directed by a substance abuse professional in accordance with the provisions of § 382.1205(c)(2)(ii).

§ 382.915 Exceptions for testing performed by consortiums.

(a) A motor carrier may use a driver who is a regularly employed driver of another motor carrier without complying with § 382.903(a) and § 382.907 if the driver meets the requirement of § 391.65 of this chapter.

(b) A motor carrier may use a driver who is not tested by the motor carrier without complying with § 382.903(a), provided the motor carrier assures itself:

(1) That the driver has participated in a drug testing program that meets the requirements of this subpart within the previous 30 calendar days, and

(2) While participating in that program, the driver was either:

(i) Tested for controlled substances within the past 6 months (from the date of application with the motor carrier) as required by § 382.903, or

(ii) Participated in the drug testing program for the previous 12 months (from the date of application with the motor carrier).

(c) Pre-employment/pre-duty testing and random testing need not be performed directly by the motor carrier provided that the motor carrier directs or approves the testing program of a contractor or previous motor carrier prior to using a driver who has participated in such a program.

(d) A motor carrier who exercises either paragraphs (a), (b) or (c) of this section or § 382.903(b) shall contact the controlled substances testing program in which the driver participates or participated and shall obtain the following information:

(1) Name and address of the program(s);

(2) Verification that the driver participates or participated in the program(s);

(3) Verification that the program(s) conform to part 40 of this title;

(4) Verification that the driver is qualified under the rules of this part, including that the driver has not refused to be tested for controlled substances;

(5) The date the driver was last tested for controlled substances;

(6) The medical review officer's verified results, negative or positive, of any tests taken within the previous six months; and

(7) The results of any referrals to a substance abuse professional for all tests which indicated controlled substances use.

(e) The motor carrier shall retain the information required by this section as specified in § 382.1005.

(f) A motor carrier who uses, but does not employ, a driver more than once a year must assure itself once every six months that the driver participates in a controlled substances testing program that meets the requirements of this part.

§ 382.917 Split sample testing.

(a) A motor carrier or medical review officer must notify a driver, whose primary specimen verified positive for controlled substance use, that the driver may request that the medical review officer to direct the lab to send the "split sample" to the NIDA-certified laboratory specified by the (motor carrier/driver). This testing will determine whether the controlled substance found in the split specimen is present in any quantity in the split sample.

(b) A driver shall submit a request for testing of the split sample to the medical review officer within 72 hours of the driver's actual notification of the verified positive test result.

(c) If the test of the split sample fails to confirm the presence of the drugs(s) or drug metabolites(s), or if the split sample is unavailable, inadequate for testing or untestable, the medical review officer shall cancel the test.

(d) A motor carrier must report every occurrence of a split sample negative test result which is preceded by a primary verified positive test result to the Regional Director, Office of Motor Carriers for the region in which the motor carrier has located its principal place of business. The address of each regional office is listed in § 390.27 of this chapter. The report must be mailed within 15 calendar days of being notified by the medical review officer that the test result has been canceled.

§ 382.919 Canceled tests.

(a) A driver, whose urine specimen was submitted for testing for preemployment/pre-duty or return-to-duty controlled substances testing under this part, which is canceled by the laboratory or the medical review officer shall resubmit a urine specimen for testing, when the driver continues to seek employment or continued employment with the motor carrier.

(b) A driver whose urine specimen was submitted for testing for post-accident or random controlled substances testing under this part which is canceled by the laboratory or the medical review officer shall not resubmit a urine specimen for testing.

(c) A driver whose urine specimen was submitted for testing for reasonable

suspicion controlled substances testing under this part which is canceled by the laboratory or the medical review officer shall not resubmit a urine specimen for testing, unless the specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the driver continue to be present and documentation of the driver's conduct is prepared and signed by the witnesses within twenty four hours of the observed behavior or before the results of the new tests are released, whichever is earlier.

Subpart J—Notification of Controlled Substance Test Results and Recordkeeping

§ 382.1001 Laboratory notifications.

A laboratory shall notify the medical review officer of controlled substances results in accordance with the procedures in part 40 of this title.

§ 382.1003 Medical review officer notifications to the tested individual.

(a) Any driver who is alleged to have violated § 382.803 of this part through a confirmed positive test result shall have available as an affirmative defense, to be proven by the driver through clear and convincing evidence to the medical review officer, that his/her use of a controlled substance (except for the substance methadone) was prescribed by a health care professional who is familiar with the driver's medical history and assigned safety-sensitive functions.

(b) The medical review officer shall make reasonable efforts to contact a driver and make available to the tested individual the opportunity to discuss a laboratory confirmed positive test result. The medical review officer shall afford a tested individual the opportunity to discuss a confirmed positive controlled substances test result with the medical review officer before reporting the test result to the motor carrier as a verified positive. If a medical review officer is unable to contact a tested driver, after making and documenting all reasonable efforts, the medical review officer shall contact a designated management official of the motor carrier to arrange for the individual to contact the medical review officer prior to being dispatched, performing or continuing to perform safety-sensitive functions, to the extent practicable. The medical review officer may verify a positive test without having communicated with the driver about the results of the test if:

(1) The driver expressly declines the opportunity to discuss the results of the test, or

(2) Within five days after a documented contact by a motor carrier's designated management official instructing the driver to contact the medical review officer, the driver has not done so.

(c) All tests reported to the motor carrier by the medical review officer as a verified positive, in which the medical review officer did not discuss the results with the driver, shall be so noted and shall be accompanied by complete documentation of the medical review officer's efforts to contact the driver including contacts with a motor carrier's designated management official.

§ 382.1005 Medical review officer notifications to the motor carrier.

(a) The medical review officer may report to the motor carrier using any communications device, but in all instances a signed written notification must be forwarded within three business days of completion of the medical review officer's review, pursuant to part 40 of this title. A medical review officer shall report to a motor carrier clearly:

(1) That the controlled substances test being reported was in accordance with part 40 of this title and this part;

(2) The name of the individual for whom the test results are being reported;

(3) The type of test indicated on the custody and control form (i.e., random, post-accident, etc.);

(4) The date and location of the test collection;

(5) The identities of the persons or entities performing the collection, analysis of the specimens and serving as the medical review officer for the specific test;

(6) The verified results of a controlled substances test, either positive or negative, and if positive, the identity of the controlled substance(s) for which the test was verified positive.

(b) A medical review officer shall report to the motor carrier that a driver is unable to be contacted for a discussion in accordance with § 382.902, and that the driver must be contacted by the motor carrier as soon as practicable and requested to contact the medical review officer within 24 hours.

§ 382.1007 Motor carrier notifications.

(a) A motor carrier shall notify a driver of the results of a pre-employment/pre-duty controlled substance test conducted under this part, if the driver requests such results within 60 calendar days of being notified of the disposition of the employment application. A motor carrier shall notify a driver of the results of random, reasonable suspicion and post-accident tests for controlled substances conducted under this part if the test results are verified positive. The motor carrier shall also inform the driver which controlled substance or substances were verified as positive.

(b) The designated management official shall make reasonable efforts to contact and request each driver who submitted a specimen under the motor carrier's program, regardless of the driver's employment status, to contact and discuss the results of the controlled substances test with a medical review officer who has been unable to contact the driver.

(c) The designated management official shall notify the medical review officer that the driver has been notified to contact the medical review officer in accordance with § 382.902.

§ 382.1009 Laboratory recordkeeping and record retention.

A laboratory performing the analysis of urine specimens for controlled substances shall maintain the specimen and the records of the analysis as specified in part 40 of this title.

§ 382.1011 Medical review officer recordkeeping and record retention.

(a) A medical review officer shall be the sole custodian of individual's test results. A medical review officer shall maintain all dated records and notifications, identified by individual, for a minimum of five years for verified positive test results.

(b) A medical review officer shall maintain all dated records and notifications, identified by individual, for a minimum of one year for negative and canceled test results.

(c) No person may obtain the individual test results retained by a medical review officer, and no medical review officer shall release the individual test results of any driver to any person, without first obtaining specific written authorization from the tested driver. Nothing in this paragraph shall prohibit a medical review officer from releasing, to the employing motor carrier or to officials of the Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the controlled substances testing program under this part, the information delineated in § 382.1005(a).

§ 382.1013 Motor carrier record retention.

(a) *General Requirement.* Each motor carrier shall maintain records of its controlled substances misuse prevention program as provided in this section. The records shall be maintained

in a secure location with controlled access.

(b) *Period of Retention.* Each motor carrier shall maintain the records in accordance with the following schedule:

(1) *Five years.* Records of driver verified positive controlled substances test results, documentation of refusals to take required tests, and driver evaluations and referrals shall be maintained for a minimum of five years.

(2) *Two years.* Records related to the collection process and training shall be maintained for a minimum of two years.

(3) *One year.* Records of negative and canceled test results (as defined in part 40 of this title) shall be maintained for a minimum of one year.

(c) *Types of records.* The following specific records shall be maintained.

(1) Records related to the collection process:

(i) Collection logbooks, if used;

(ii) Documents relating to the random selection process;

(iii) Documents generated in connection with decisions to administer reasonable suspicion controlled substances tests;

(iv) Documents generated in connection with decisions on post-accident testing;

(v) Documents verifying existence of a medical explanation of the inability of a driver to provide a urine specimen for testing; and

(vi) Consolidated annual reports as required by § 382.1015.

(2) Records related to test results:

(i) The motor carrier's copy of the custody and control form;

(ii) Documents sent by the medical review officer to the motor carrier, including those required by § 382.1005.

(iii) Documents related to the refusal of any driver to submit to a controlled substances test administered under this part;

(iv) Documents presented by a driver to dispute the result of a controlled substance test administered pursuant to this part;

(3) Records related to evaluations:

(i) Records pertaining to a determination by a substance abuse professional concerning a driver's need for assistance; and

(ii) Records concerning a driver's compliance with recommendations of the substance abuse professional, including records pertaining to rehabilitation and return to duty/follow-up testing as required by a substance abuse professional.

(4) Records related to education and training:

(i) Materials on controlled substances use awareness, including a copy of the motor carrier's policy on controlled substances use;

(ii) Documentation of compliance with the requirements of § 382.501;

(iii) Documentation of training provided to supervisors for the purpose of qualifying the supervisors to make a determination concerning the need for controlled substances testing based on reasonable suspicion; and

(iv) Certification that any training conducted under this part complies with the requirements for such training.

(5) Notifications, by date and time, of persons required to be notified as required by this part, including but not limited to, randomly selected drivers for testing, drivers requested to contact a medical review officer, medical review officers that the designated management official has contacted the driver or driver-applicant etc.

§ 382.1015 Reporting of results in a management information system.

(a) Each motor carrier shall submit to the Federal Highway Administration, when requested, an annual report covering the calendar year, summarizing the results of its controlled substances misuse prevention program.

(b) Each motor carrier that is subject to more than one DOT agency controlled substances regulation shall identify each driver covered by the regulations of more than one DOT agency. The identification will be by the total number and category of covered safety sensitive functions (*e.g.*, drivers of commercial motor vehicles, airmen, pipeline inspectors, etc). Prior to conducting any controlled substance test on a driver subject to the regulations of more than one DOT agency, the motor carrier must determine which DOT agency regulation or regulations authorizes or requires the test. When a motor carrier determines that a test is required under U.S. Coast Guard or Research and Special Programs Administration (RSPA) regulations, as well as the requirements in this part, the motor carrier must use "split sample" testing procedures. The test result information shall be directed to the appropriate DOT agency or agencies.

(c) Each motor carrier shall ensure the accuracy and timeliness of each report submitted by the motor carrier or a consortium.

(d) Each motor carrier notified shall submit the required annual reports no later than February 15 of each year. The report shall be submitted on the form specified by the FHWA. Each report shall contain:

(1) Number of drivers by employee category;

(2) Number of drivers subject to testing under the anti-drug rules of more than one DOT Agency, identified by each agency;

(3) Number of specimens collected by type of test (i.e., pre-employment, random, return-to-duty, etc.) and employee category;

(4) Number of positives verified by a Medical Review Officer by type of test, type of drug and employee category;

(5) Number of negatives verified by a Medical Review Officer by type of test and employee category;

(6) Number of persons denied a position as a driver following a verified positive controlled substances test;

(7) Number of drivers with verified positive by a Medical Review Officer who were returned to duty in driving positions during the reporting period;

(8) Number of drivers with tests verified by a Medical Review Officer for multiple drugs;

(9) Number of drivers who refused to submit to a controlled substances test required under this part, and the action taken in response to the refusal(s); and

(10) Number of supervisors who have received required training during the reporting period.

§ 382.1017 Access to individual records.

(a) Except as required by law or expressly authorized or required in this section, no motor carrier shall release driver information that is contained in records required to be maintained under § 382.1013.

(b) A driver is entitled, upon written request, to obtain copies of any records pertaining to the driver's use of controlled substances, including any records pertaining to his or her controlled substances tests. The motor carrier shall promptly provide the records requested by the driver. Access to a driver's records shall not be contingent upon payment for records other than those specifically requested

(c) Each motor carrier shall permit access to all facilities utilized in complying with the requirements of this part to the Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the controlled substances testing program under this part.

(d) Each motor carrier and medical review officer shall make available copies of all results for motor carrier controlled substances testing conducted under this part and any other information pertaining to the motor carrier's controlled substances misuse prevention program, when requested by the Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the motor carrier or its drivers.

(e) When requested by the National Transportation Safety Board as part of

an accident investigation, a motor carrier shall disclose information related to the motor carrier's administration of a post-accident controlled substances test administered following the accident under investigation.

(f) Records shall be made available to a subsequent motor carrier upon receipt of a written request from the driver. Disclosure by the subsequent motor carrier is permitted only as expressly authorized by the terms of the driver's request.

(g) A motor carrier may disclose information required to be maintained under this part pertaining to a driver to the driver or the decisionmaker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the individual, and arising from the results of a controlled substances test administered under this part, or from the motor carrier's determination that the driver engaged in conduct prohibited by subpart H of this part (including, but not limited to, a worker's compensation, unemployment compensation, or other proceeding relating to a benefit sought by the driver).

(h) A motor carrier shall release information regarding a driver's records only as directed by the specific, written consent of the driver authorizing release of the information to an identified person. Release of such information by the person receiving the information is permitted only in accordance with the terms of the driver's consent.

Subpart K—Consequences For Drivers Engaging In Controlled Substances-Related Conduct

§ 382.1101 Removal from safety-sensitive function.

(a) Except as provided in subpart L of this part, no driver shall perform safety-sensitive functions if the driver has engaged in conduct prohibited by subpart H of this part or a controlled substances misuse regulation of another DOT agency.

(b) No motor carrier shall permit any driver to perform safety-sensitive functions if the motor carrier has determined that the driver has violated this section.

§ 382.1103 Required evaluation and testing.

No driver who has engaged in conduct prohibited by subpart H of this part shall perform safety-sensitive functions unless the driver has met the requirements of § 382.1205. No motor carrier shall permit a driver to perform safety-sensitive functions unless the driver has met the requirements of § 382.1205. Nothing in this section shall be construed to prohibit the continued performance of safety-sensitive functions necessary to respond to an emergency.

§ 382.1105 Other controlled substances-related conduct.

(a) No driver tested under the provisions of subpart I of this part who is found to have a verified positive controlled substances test result shall perform or continue to perform safety-sensitive functions for a motor carrier, nor shall a motor carrier permit the driver to perform or continue to perform safety-sensitive functions, until:

(1) The driver submits to a controlled substance test which has a verified negative result; and

(2) The driver completes any rehabilitation program prescribed by a substance abuse professional in accordance with subpart L of this part.

(b) Nothing in this section shall be construed to prohibit the continued performance of safety-sensitive functions necessary to respond to an emergency.

§ 382.1107 Additional consequences for controlled substances violations.

(a)(1) *General rule.* A driver who is found through testing under this part to have a verified positive controlled substances test result is prohibited from driving for the periods specified in paragraph (a)(2) of this section.

(2) *Duration of prohibited driving periods*—(i) *Second violation.* A driver who, during any 3-year period, is found to have a verified positive controlled substances test result twice in separate incidents, is prohibited from driving any commercial motor vehicle, as defined in this part or part 390 of this subchapter, for a period of 60 consecutive days.

(ii) *Third and subsequent violations.* A driver who, during any 3-year period, is found to have a verified positive controlled substances test result three or more times in separate incidents, is prohibited from driving any commercial motor vehicle, as defined in this part or part 390 of this chapter, for a period of 120 consecutive days.

(b) A driver who refuses to be tested for controlled substances under the provisions of subpart H of this part shall not drive any commercial motor vehicle, as defined in this part or part 390, for a period of not less than one year.

(c) No motor carrier shall knowingly use a driver to drive any commercial motor vehicle, as defined in this part or part 390 of this chapter, during the prohibition periods specified under this section, when the driver is in violation of any of the requirements of subpart H of this part. A motor carrier that knowingly uses a driver to violate this subpart shall be subject to the penalty provisions of 49 U.S.C. 521(b).

(d) No motor carrier shall knowingly use a driver who has been found to have violated any requirements of subpart H of this part to drive any commercial motor vehicle, as defined in this part or in part 390 of this subchapter, or perform any other safety-sensitive functions regulated by any DOT agency, until the driver has complied with the requirements of this part, including the completion of any evaluation, treatment, or return to duty testing required by the substance abuse professional, and any other applicable DOT agencies' regulations.

(e) A driver shall be prohibited from driving for a period of one year following a verified positive controlled substances test result when the driver has been involved in a fatal accident.

§ 382.1109 Disqualifications.

(a) Nothing in this subpart shall be construed to restrict the authority of Federal, State or local officials from implementing § 383.51 of this chapter. A driver who is convicted of driving a commercial motor vehicle under the influence of a controlled substance shall be subject to the disqualifications provided in § 383.51(b)(3) of this chapter.

(b) Notwithstanding the provisions of this part, the penalty provisions of § 391.15 of this chapter remain applicable within this part for actions taken by Federal Highway Administration officials.

Subpart L—Controlled Substances Use Information, Training, and Referral

§ 382.1201 Motor carrier obligation to promulgate a policy on the misuse of controlled substances.

(a) *General requirements.* Each motor carrier shall provide educational materials that explain the requirements of this part and the motor carrier's policies and procedures with respect to meeting these requirements. Each motor carrier shall provide written notice to every driver and to representatives of driver organizations of the availability of this information.

(b) *Required content.* The materials to be made available to drivers shall include detailed discussion of at least the following:

(1) The identity of the person designated by the motor carrier to answer driver questions about the materials;

(2) The categories of drivers who are subject to the provisions of this part;

(3) Sufficient information about the safety-sensitive functions performed by those drivers to make clear what period of the work day the driver is required to be in compliance with this part;

(4) Specific information concerning driver conduct that is prohibited by this part;

(5) The circumstances under which a driver will be tested for controlled substances under this part;

(6) The procedures that will be used to test for the presence of controlled substances, protect the driver and the integrity of the urine specimens, safeguard the validity of the test results, and ensure that those results are attributed to the correct driver;

(7) The requirement that a driver submit to controlled substances tests administered in accordance with this part;

(8) An explanation of what constitutes a refusal to submit to a controlled substances test and the attendant consequences;

(9) The consequences for drivers found to have violated subpart H of this part, including the requirement that the driver be removed immediately from safety-sensitive functions, and the procedures under § 382.1205 of this part.

(10) The requirement that a driver shall have the right to have the split sample specimen tested by a different NIDA-certified laboratory, when a request for such test is made by the driver to the medical review officer within 72 hours of being notified of a verified positive test result; and

(11) Optional provision. The materials supplied to drivers may also include information on additional motor carrier policies with respect to the use or possession of controlled substances, including any consequences for a driver found to have used controlled substances, that are based on the motor carrier's authority independent of this part. Any such additional policies or consequences must be clearly and obviously described as being based on independent authority.

§ 382.1203 Training for supervisors and company officials.

Each motor carrier shall ensure that persons designated to determine whether reasonable suspicion exists to require a driver to undergo controlled substances testing under § 382.911 receive at least 60 minutes of training on the physical, behavioral, speech, and performance indicators of probable controlled substances misuse.

§ 382.1205 Referral, evaluation, and treatment.

(a) A driver who has engaged in conduct prohibited by subpart H of this part shall be advised by the motor carrier of the resources available to the driver in evaluating and resolving problems associated with the misuse of controlled substances, including the names, addresses, and telephone numbers of substance abuse professionals and counseling and treatment programs.

(b) Each driver who engages in conduct prohibited by subpart H shall be evaluated by a substance abuse professional who shall determine what assistance, if any, the driver needs in resolving problems associated with controlled substances misuse.

(c)(1) Before a driver returns to duty requiring the performance of a safety sensitive function after engaging in conduct prohibited by subpart H of this part, the driver shall undergo a return-to-duty controlled substances test with a negative test result.

(2) In addition, each driver identified as needing assistance in resolving problems associated with controlled substances misuse—

(i) Shall be evaluated by a substance abuse professional to determine that the driver has properly followed the rehabilitation program prescribed under paragraph (b) of this section, and

(ii) Shall be subject to unannounced follow-up controlled substances tests administered by the motor carrier following the driver's return to duty. The number and frequency of such follow-up testing shall be determined by a substance abuse professional, but shall consist of at least six tests in the first 12 months following the driver's return to duty. Follow-up testing shall not exceed 60 months from the date of the driver's return to duty. The substance abuse professional may terminate the requirement for follow-up testing at any time after the first six tests have been administered, if the substance abuse professional determines that such testing is no longer necessary.

(d) Evaluation and rehabilitation may be provided by the motor carrier, by a substance abuse professional under contract with the motor carrier, or by a substance abuse professional not affiliated with the motor carrier. The choice of the substance abuse professional and assignment of costs shall be made in accordance with motor carrier/driver agreements and motor carrier policies.

(e) The requirements of this section with respect to referral, evaluation and rehabilitation do not apply to applicants who refuse to submit to a pre-employment/pre-duty controlled substances test or who have a pre-employment/pre-duty controlled substances test with a verified positive test result.

[FR Doc. 92–29681 Filed 12–10–92; 10:00 am]

BILLING CODE 4910–22–M

Federal Register

Tuesday
December 15, 1992

Part V

Department of Transportation

Federal Railroad Administration

49 CFR Parts 217 and 219
Drug and Alcohol Testing Programs; Proposed Rules

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 219

[Docket No. RSOR–6; Notice No. 34]

RIN 2130–AA43

Alcohol Testing; Amendments to Alcohol/Drug Regulations

AGENCY: Federal Railroad Administration (FRA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: FRA proposes to amend and expand its current alcohol/drug testing requirements to include, for safety-sensitive employees, pre-employment and random testing for alcohol, to amend its existing regulations regarding control of alcohol and drug use in railroad operations by incorporating new procedures and safeguards with respect to breath and body fluid testing for alcohol, to make reasonable suspicion testing mandatory for both alcohol and drugs, and to make additional changes. The proposed amendments would conform FRA's regulations to the requirements of the Omnibus Transportation Employee Testing Act of 1991 and would also reflect experience derived from program administration.

DATES: (1) Any request to make an oral presentation must be received by January 4, 1993.

(2) Written comments must be received by April 14, 1993. Late filed comments will be considered to the extent practicable.

ADDRESSES: Comments shall be filed in triplicate with the Docket Clerk, Docket No. RSOR–6, Office of the Chief Counsel, Federal Railroad Administration, 400 7th Street, SW., room 8201, Washington, DC, 20590. Parties wishing the FRA to acknowledge receipt of their comments should submit with those comments a pre-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. RSOR–6." The postcard will be dated and time stamped and returned to the commenter. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons, between 8:30 a.m. and 5 p.m. Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Walter C. Rockey, Executive Assistant to the Associate Administrator for Safety (RRS–3), Office of Safety, FRA, Washington, DC 20590 (Telephone: (202) 366–0897) or Patricia V. Sun, Trial Attorney (RCC–30), Office of Chief Counsel, FRA, Washington, DC 20590 (Telephone: (202) 366–4002).

SUPPLEMENTARY INFORMATION:

Background

On November 21, 1988 (53 FR 47103), FRA published a final rule containing amendments to its alcohol and drug regulations, which were first promulgated on August 2, 1985. These amendments established a random drug testing program and added new safeguards for urine drug testing, incorporating procedures from a Department of Transportation regulation, "Procedures for Transportation Workplace Drug Testing Programs" (49 CFR part 40), that had instituted standards for drug testing of transportation employees. FRA published additional amendments to its alcohol and drug regulations on December 27, 1989 (54 FR 53238) and June 4, 1990 (55 FR 22791). The current regulations are published as part 219, Title 49, Code of Federal Regulations.

On October 28, 1991, the President signed into law the Department of Transportation and Related Agencies Appropriations Act for Fiscal Year 1992, Pub. L. No. 102–143, Title V of which enacts legislation popularly known as the Omnibus Transportation Employee Testing Act of 1991 (hereinafter the "Act"). The Act amends the Federal Aviation Act, the Federal Railroad Safety Act, and the Commercial Motor Vehicle Safety Act, specifically mandating alcohol and drug countermeasures for the aviation, rail and commercial trucking segments of the transportation industry. In addition, the Act enacted similar requirements for mass transit. Language utilized in the several amendments was generally parallel, but the differing histories and industry contexts addressed by legislation were reflected in subtle ways. In the case of the rail provision, explicit language preserved existing alcohol/drug regulations, which had been the subject of multiple legislative hearings by the Senate Committee on Commerce, Science and Transportation, from which the Act had been reported on several occasions (See, *e.g.*, S. Rept. No. 101–172). The sponsors and the Committee had repeatedly emphasized that it was not their intention to disrupt or displace existing regulatory provisions applicable to railroads.

Nevertheless, the Act embodies express mandates that must be honored and that go beyond the four corners of existing regulations. Among the most important requirements pertinent to this NPRM are the following:

- Pre-employment alcohol testing, to complement the current requirement for pre-employment drug testing.
- Mandatory reasonable suspicion testing for both alcohol and drugs (in lieu of discretionary or "authorized" testing under broader "reasonable cause" provisions).
- Random alcohol testing, to complement the current requirement for random drug testing.

Split sample testing, which is currently permitted, will now be required as a safeguard to reassure the sober and responsible employee that he or she will not be threatened by an error in the testing process. (The requirement for split samples is addressed in the separate Notice of Proposed Rulemaking to amend the Procedures for Transportation Workplace Drug Testing published elsewhere in today's **Federal Register**.)

In addition, the legislation instructs the Secretary to issue requirements for rehabilitation programs which at a minimum provide for the identification and opportunity for treatment of railroad employees responsible for safety-sensitive functions. Here the statute uses language similar, but not identical to that employed in subpart E of part 219. As such, it is an apparent reference to employment-based mechanisms for evaluation of substance abuse disorders, referral of substance abusers to treatment resources, and determinations with respect to return to duty. FRA understands this provision to address the quality of employee assistance services, since FRA already requires that basic services be accessible and that the employment relationship be protected where the troubled employee steps forward and requests help (or is referred by a co-worker). Accordingly, FRA joins the other modal administrations in proposing professional requirements for employee assistance professionals ("substance abuse professionals").

The generic issues pertaining to alcohol misuse that are presented by the legislation are discussed in a DOT-wide preamble published by the Office of the Secretary of Transportation (hereinafter "OST") elsewhere in today's **Federal Register** (hereinafter common preamble). The common preamble is incorporated herein by reference.

Because the FRA rule already embodies the great majority of the requirements contemplated by the legislation in a manner well suited to the railroad industry, and because considerable effort has been expended in training industry personnel in those requirements, some of the preamble discussion is not directly applicable to

the proposals presented in this Notice. However, in each major subdivision of the section-by-section analysis set forth below, the basis for these differences is discussed.

The Federal Aviation Administration, Federal Highway Administration, Federal Transit Administration and Research and Special Projects Administration are also publishing alcohol testing NPRMs in today's **Federal Register**. Since FRA's proposed rule integrates the requirements of the Act into the existing structure of part 219, FRA's format differs from that of these operating administrations. FRA is therefore adding two appendixes to part 219. Appendix E contains a template that facilitates intermodal use by comparing each modal section to the corresponding language or concept in FRA's regulations. (Appendix D, which contains FRA's standard reporting form for the proposed management information system (MIS) discussed below, is published elsewhere in today's **Federal Register** as part of FRA's drug program management information system NPRM.)

Framework of the Railroad Proposal

The Act requires FRA to reexamine its existing alcohol/drug regulations. FRA has done so. Consistent with the Act's command, FRA now proposes minor adjustments in its existing regulatory program. These adjustments appear to be appropriate at this juncture due to the progress achieved under the existing rule and lessons learned as a result of additional experience in administering this program.

Among the adjustments proposed in this document are the following:

- Coverage of "safety-sensitive" employees would be reconsidered. FRA specifically proposes to include in the definition of covered employee any person engaged in the direct supervision of Hours of Service employees, including yardmasters.
- Although FRA proposes to retain its existing post-accident toxicology program, FRA proposes to reduce the number of low-damage collisions and derailments that would require testing. FRA is also prepared to consider any further adjustments in this program that may be warranted by experience, and welcomes comments on substitution of mandatory breath analysis for alcohol, together with conventional urinalysis for drugs, as a substitute for the existing program. In its final rule, FRA will amend appendix C to part 219 to include changes in post-accident sample collection and toxicology kits mandated by the new split sample procedures.

FRA has now been in almost continuous rulemaking on the issue of alcohol and drugs since 1983. This rulemaking offers the opportunity to bring some stability to this subject matter, so that attention can be turned to other, equally significant safety concerns in the field of human factors. FRA encourages active participation by the regulated community, including individual employees, employee organizations, and railroad companies.

Relationship to Existing Industry Programs

Following publication of the final rule on Certification of Locomotive Engineers (49 CFR part 240; 56 FR 28228, June 19, 1991), FRA received several inquiries regarding the effect of provisions of that rule with respect to implementation of voluntary alcohol/drug prevention programs with voluntary "mark-off" procedures, such as Operation Red Block, the rail peer prevention program. The question was whether, on railroads that permit either pre-duty or on-duty mark-offs without discipline, an engineer utilizing this procedure would be required to be handled under the mandatory certificate revocation procedures requiring a 9-month revocation period where a single violation of § 219.101 (on-duty use, possession, or impairment; BAC of .04 or greater) is established. FRA has responded to these inquiries indicating that the mark-off, by itself, does not give rise to actual knowledge on the part of the railroad that a violation has, in fact, occurred; and the railroad would not violate its duty to prevent violations by permitting the mark-off to go forward under established procedures. The reason for this position is that programs which attack co-worker tolerance of on-duty use of alcohol or drugs advance safety and add to the array of prevention techniques at work on the railroad.

The current regulatory proposals would adopt the same philosophy and approach. The objective of these programs is to enlist co-workers to apply pressure on a substance abuser to mark-off and seek assistance with his or her problem, thereby increasing the overall deterrent effect of anti-drinking policies. In this way the entire workforce takes responsibility for compliance. This collective responsibility is particularly valuable in work settings where supervisors are seldom present (as with many railroad assignments).

Most voluntary mark-offs should occur quietly, without fanfare, as if the employee had simply become ill. Abuses are limited by intervention on the part of employee prevention committees, which emphasize the unacceptability of the behavior and refer the troubled worker to the employee assistance program, as appropriate.

Experience teaches that a mark-off should be disallowed any time it is undertaken "in anticipation" of detection through supervisory observation or a chemical test. It is not enough that the mark-off occur prior to notice of the test, since at that point the employer could have adequate independent evidence to proceed without a test.

A violator who is about to be detected should not be able to use the program as a sanctuary. While the most manifest example of an invalid mark-off would be where the employee attempted to mark-off after receiving notice of a test, other, less obvious circumstances that should also invalidate an attempt to mark-off include: Mark-off to evade a supervisor who has just determined that reasonable suspicion exists to test the employee, or mark-off once the employee knows that testing collectors are on the job site (even if the employee had not received notice of a test at the time). Responsible peer prevention programs guard against abuses of this kind; and these programs are worthy of enthusiastic support.

SECTION BY SECTION ANALYSIS

Subpart A—General

Section 219.3 Application

Small Railroad Exclusion

As mentioned above, FRA is proposing a management information system, a new reporting system for alcohol and drug program information that would replace the data that railroads currently must submit in § 217.13(d) of the annual report. FRA would exempt small railroads, previously defined as employers with 15 or fewer covered employees that do not engage in joint operations, from the MIS reporting requirements in the new subpart I and the proposed recordkeeping requirements contained in the new subpart J. Small railroads will have little or no alcohol and drug program data to report, and correspondingly, few if any program records to keep.

No changes are contemplated for FRA's current exemption of small railroads from subparts D, E, F and G, since small entities would be exempted from the proposed alcohol testing amendments. FRA's previously published reasons for this treatment of small railroads remain valid. Employees of small railroads operate at low speed over private rights of way and are

subject to much closer supervision than employees of larger carriers. Compliance with breath alcohol testing would be more difficult for small railroads, particularly those situated in rural areas (as is very often the case). Requiring these isolated small entities to conduct random alcohol testing is therefore unnecessary, as evidenced by the fact that no employee from such a small entity has had a positive post-accident test in the six years of FRA's program.

FRA requests comment, however, on two small railroad issues. First, what should small railroads (who will not be required to conduct mandatory reasonable suspicion testing) be expected to do if faced with an obviously drunk employee reporting for duty, particularly if an evidential breath testing device (EBT) is not readily available on the railroad's property? Second, should small railroads, who are exempt from the employee assistance requirements of Subpart E, nevertheless be required to provide information on substance abuse services to their employees? (In the proposed section 219.23(d), larger railroads would be required to provide information to all of their employees (not just those who have been identified as having a substance-abuse problem) on the availability of substance abuse evaluation and treatment resources).

Section 219.5 Definitions

FRA proposes to define the concept of *alcohol concentration* in the alternative. When used with respect to blood, the existing definition would apply (grams per 100 milliliters of whole blood, expressed as a percent). When used with respect to breath analysis, the term would refer to the alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath (as indicated by an evidential breath test under this part). The effect of this is to avoid fruitless controversy over the breath/blood partition. Contemporary motor vehicle statutes already embody this approach, consistent with recommendations of the National Highway Traffic Safety Administration. FRA needs a specific reference to alcohol concentration in blood because of the unique use of blood specimens under the post-accident testing program.

FRA proposes to expand its definition of *covered employee* to include supervisors for the first time in random alcohol and drug testing programs. Trainmasters, chief dispatchers, and others who directly supervise or control the actions of Hours of Service employees would be included, but coverage would be determined by function and not job title. FRA believes that the impact of this redefinition would be small, since many carriers already use their own authority to randomly test supervisory employees. Impairment of the faculties of the supervisor could result in issuance of instructions that could lead to unsafe practices or failure to identify unsafe practices by employees (including failure to identify or act on instances of alcohol/drug use or impairment). The supervisors involved would include supervisors of locomotive engineers, who have key roles in the administration of the locomotive engineer certification program (49 CFR part 240).

FRA solicits comment, however, on where the supervisory lines should be drawn. How direct must a manager's supervisory duties be, for him or her to be covered? How many persons would be included if only first-line supervisors of Hours of Service employees are included? To what extent may higher officers in the operating departments have occasion to issue safety-related instructions directly to train crews or dispatchers; and how should such cases be handled under the rule?

FRA introduces a new definition, *substance abuse professional* (SAP), which replaces the current definition of *EAP counselor* while carrying forward the same concept embodied in FRA's present rule. The new definition will accomplish two purposes. First, it provides a structure consistent with that of other regulated transportation industries. Second, the definition requires certification of the individual by an appropriate state regulatory body or an appropriate national standards organization. A physician qualified to practice in the field of substance abuse disorders would be within this definition.

FRA's current definition of EAP counselor recognizes that the counselor "owes a duty to the railroad to make an honest and fully informed evaluation of the condition and progress of the employee." This is important because the professional must place the interest of safety above other considerations when advising the employer concerning the return to duty decision. The Common Preamble requests comment on how best to carry this concept forward in the context of these proposed amendments.

FRA would also substitute *substance abuse professional* for *EAP counselor* wherever that term appeared in the text of the Locomotive Engineer Certification rule. Commenters are welcome to suggest other changes that may be necessary to conform the language of 49 CFR part 240 to the language of this part.

Section 219.9 Responsibility for Compliance

Paragraph (a)

FRA proposes to conform this section to the recently enacted Rail Safety Enforcement and Review Act (RSERA), Public Law No. 102–365, which amended the Federal Railroad Safety Act of 1970 (FRSA) (See 45 U.S.C. 438(a)). The proposed amendment makes clear that this part, like all regulations issued under authority of the FRSA, applies not only to railroads but also to any independent contractors, agents, lessors, and lessees who provide goods and services to railroads. The amendment would also raise the minimum penalty for violations of this part from $250 to $500, as mandated by the RSERA.

Section 219.11 General Conditions for Chemical Tests

Paragraph (c)(4)

A new paragraph would be added to provide for the release of breath alcohol test results to FRA; the release of body fluid test results for alcohol is already provided for in paragraph (d) of this section. Covered employees would be deemed to have consented to the release of alcohol test results to FRA.

Paragraph (g)

Since current requirements for supervisory training for drugs are three hours in duration, and since reasonable suspicion training for drugs will now be required rather than merely authorized, FRA proposes to make supervisory training mandatory for both alcohol and drugs, with a minimum of three hours set aside for the combined training. Programs should cover the signs and symptoms of drug abuse, and post-accident testing criteria and collection procedures. FRA also recommends that programs include training on long term indicators of substance abuse that could provide a basis for intervention and referral.

Reasonable suspicion training programs are required to be filed with FRA. FRA's Field Manual provides curriculum materials for this purpose. Most major railroads have previously provided training of this kind.

Section 219.13 Preemptive Effect

Section 219.13, which states the preemptive effect of safety regulations issued under the FRSA (See 45 U.S.C. 434), would remain unchanged. The Act expressly did not provide a new preemption standard; instead, it

amended the FRSA to require the Secretary to issue rules, regulations, standards, and orders relating to alcohol and drug use in railroad operations.

Section 219.19 Field Manual

FRA will revise its Field Manual to include guidance on the new random alcohol testing procedures. After revision is complete, FRA will publish a Notice in the **Federal Register** announcing where copies of the updated manual can be obtained.

Section 219.21 Information Collection

As discussed above, FRA is proposing a management information system which would replace FRA's existing reporting requirements in part 217. The drug program portion of the MIS is published elsewhere in a separate NPRM in today's **Federal Register.** FRA now proposes, in new § 219.801, data elements that are specifically tailored to capture employer information that will become available after mandatory alcohol testing has been implemented.

Section 219.23 Railroad Policies

The proposed standard alcohol testing custody and control form published elsewhere in today's **Federal Register** in the Department's revisions to 49 CFR part 40 would be incorporated into subpart H of part 219 of FRA's regulations. It is FRA's desire that this form provide both the requisite notice to the employee that the test is being conducted under Federal requirements and written confirmation of the basic reason for the test (*e.g.*, random selection, reasonable suspicion, etc.).

Under § 219.601(d), notice to all covered employees was a precondition of random drug testing implementation. The notice had to include, among other information, the consequences of a violation of § 219.102 of this part (or any applicable railroad rule) and the employee's rights under subpart E of this part. FRA proposes to expand upon this notice concept in § 219.23(d) to require every railroad to disseminate information to each covered employee on the policies and procedures that the railroad will institute to comply with the requirements of this part. The railroad may also supply materials on its voluntary mark-off program, if it has one.

As discussed earlier in the application section, FRA would now require railroads to publish information on identifying and treating substance abuse problems to each employee. FRA hopes that this will encourage the employee with a substance abuse problem to self-refer for treatment, since the names, addresses and telephone numbers of substance abuse professionals, treatment programs and counseling programs will be supplied to all employees, not just those who have been identified as needing treatment. An employee can thus obtain such information without fear of stigmatization.

When combined, the proposed information requirements in this section should reinforce each other in encouraging the employee with a substance abuse problem to seek treatment before detection.

Subpart B—Prohibitions

Section 219.101 Alcohol and Drug Use Prohibited

FRA proposes a new paragraph, § 219.101(a)(3), that would prohibit a safety-sensitive employee from using alcohol either for four hours before reporting to perform covered service, or for the period of time running from when the employee receives a "call," or notice to report for covered service, to when the employee actually reports for covered service, whichever is the lesser of the two periods. A railroad would also be prohibited, through the employer's duty to prevent violations of § 219.101 and § 219.102, from allowing an employee to report for covered service, or go or remain on duty in covered service, if the railroad has actual knowledge that the employee is in violation of § 219.101(a)(3). This proposal would conform to the OST pre-duty abstinence proposal published elsewhere in today's **Federal Register.**

Is this pre-duty prohibition workable, in light of the very real problem posed for "short-call" employees, such as those who operate trains in pool crew service and off extra boards and signal maintainers who are subject to call without notice round the clock to handle "trouble calls?" FRA solicits suggestions on this problem, but proposes to alleviate it by allowing these employees (who are typically subject to a call of no more than two hours prior to time of reporting), to be in compliance with the pre-duty prohibition if they abstain from using alcohol from the time they are called to the time they report, even if that period of abstention runs for less than four hours before reporting to perform covered service. FRA believes that to do otherwise would be to impose total prohibition of alcohol use on short-call employees, which FRA believes would reduce the credibility of the prohibitions and thereby potentially reduce overall compliance. Comment is, of course, welcome on this proposal.

Section 219.104 Responsive action.

Paragraph (a)

FRA would revise this paragraph to clarify when the hearing rights, return to service conditions, follow-up tests, and information requirements contained in this section and § 219.105(c) apply. These sections would apply when the railroad has persuasive evidence that an employee has violated § 219.101 or 219.102, or when an employee refuses to provide breath or a body fluid sample when required to by the railroad under a mandatory provision of this part (post-accident, reasonable suspicion, and random testing). These sections do not apply when an applicant's pre-employment or pre-duty test indicates the misuse of alcohol or controlled substances, or when an applicant refuses to submit to a pre-employment or pre-duty test.

Paragraph (c)

FRA proposes to consolidate all of the hearing procedures listed elsewhere in this part into one common section, § 219.104(c), for ease of reference. Thus, the paragraphs that outlined hearing procedures in § 219.213(b), for a refusal to undergo post-accident testing, and in § 219.609(b), for a refusal to undergo random testing, would be deleted. These paragraphs had merely restated procedural rights already contained in § 219.104(c); there would be no substantive changes made by this consolidation.

Paragraph (d), Return to Covered Service

FRA proposes deletion of its current procedures concerning optional blood tests and return to service tests for employees who test positive on a breath alcohol test, since all alcohol testing procedures would be subsumed into subpart H, which would incorporate by reference the new alcohol testing procedures proposed by OST in 49 CFR part 40 elsewhere in today's **Federal Register.**

Paragraph (e)

FRA also proposes that an employee's first year of followup testing after a post-removal return to covered service include a minimum of six unannounced tests. The proposed regulatory text provides that these follow-up tests would track the basis for the employee's removal; that is, an employee who was removed for misuse of controlled substances or for refusing to provide body fluid samples under a mandatory provision of this part would be follow-up tested only for drugs, while an employee who was removed for misuse

of alcohol or for refusing to provide breath under a mandatory provision of this part would be follow-up tested only for alcohol.

FRA is concerned about the issue of polyabuse, however, and seeks comment on requiring both forms of testing. Prior testimony and comments in this docket suggest that a significant number of employees combine drug misuse with alcohol misuse. Consequently, FRA's Locomotive Engineer Qualifications Rule (49 CFR part 240) requires a minimum of six unannounced drug tests and six unannounced alcohol tests in an employee's first year of follow-up testing. Should this pattern be extended to other safety-sensitive employees? The Common Preamble also seeks comment on this approach.

FRA's proposed testing minimums are based on experience gained in compliance reviews that have indicated insufficient attention to follow-up by some railroads. Railroads would remain free to schedule additional testing, if desired, for the 48 months following this first year of mandatory follow-up testing.

Additional follow-up tests would be permitted either under an established program approved by a substance abuse professional (*e.g.*, a qualified medical director) that treats all similarly situated employees the same (*e.g.*, unannounced tests averaging once per month for three years for all clinically diagnosed cocaine dependent employees) or per the judgment of the particular substance abuse professional handling an individual case. This is important to allow the employer to establish objective criteria where the substance abuse professional may be reluctant to take on an "enforcement" role (as opposed to a "therapeutic" role) in the context of a particular case.

Where evaluation has led to a medical work-up, the advice of a physician should be taken into account (physical dependencies, related medical conditions, etc.). The employer may return the employee to covered service only upon the recommendation of the substance abuse professional.

Paragraph (f)

FRA proposes this paragraph to cover those situations where an employee's test result indicates an alcohol concentration between .02 percent and .039 percent; this BAC would be below the level of per se prohibition, but could still indicate some level of impairment. In practice, FRA anticipates that the employee would be sent home for the duration of the anticipated assignment plus eight or ten hours (representing the normal rest period under the Hours of Service Act); however, in no case should the employee be allowed to report for covered service until a minimum of eight hours has elapsed since administration of the confirmatory test.

FRA joins other DOT agencies in proposing that a railroad be permitted to allow an offending employee to remain in the workplace and be restored to service after a later test indicating an alcohol concentration of less than .02. FRA is concerned, however, that this proposal could undermine Rule G, the longstanding railroad industry rule that bars working with any alcohol in the employee's system. Comment is requested on this industry-specific consideration.

Paragraph (g):

This proposed paragraph emphasizes that the due process and follow-up testing requirements contained in this section apply only when a railroad removes an employee in response to a test conducted under Federal authority.

Section 219.107 Consequences of Unlawful Refusals

As discussed later in § 219.300, FRA proposes a minimum nine month disqualification for a refusal to submit to a mandatory reasonable suspicion test. Since the same consequence is already required for refusal to submit to a post-accident or random test, FRA would consolidate the consequences of an unlawful refusal into one section for ease of reference. This consequence would also apply to refusal of a follow-up test. Any language in subparts C and G on the consequences of a refusal would be deleted and restated in the new § 219.107 without substantive change. Thus, § 219.213(a), on refusal to undergo post-accident testing, § 219.603 and § 219.609, on refusal to undergo random testing, and the new § 219.300(c), on refusal to undergo reasonable suspicion testing, would all refer the reader to § 219.107 for delineation of the consequences. This restructuring, similar to that proposed for hearing procedures in § 219.104, would underscore the uniformity of consequences for a refusal to submit to testing under this part.

Subpart C—Post-Accident Toxicological Testing

As mentioned in OST's NPRM, the Common Preamble discussion of post-accident testing does not apply to FRA's program, which unlike those of other modes, requires full toxicological testing following designated accidents and casualties. FRA is interested in comments on the possible use of breath alcohol testing as a substitute, for those cases where collection times might be shortened.

Except for the proposed changes below, FRA would retain its existing subpart C. The amendments to testing criteria reflect the very low positive rates experienced in recent years.

Section 219.201 Events for Which Testing is Required

FRA proposes amending its property damage criteria for major train accidents and for impact accidents as follows:

Paragraph (a)(1)(iii) [Damage Threshold for Major Train Accidents]

FRA would redefine major train accidents by raising the amount of railroad property damage to require testing only after accidents that cause $1,000,000 or more in damage. In doing so, FRA hopes to capture fewer events by removing many track- and equipment-caused accidents from mandatory post-accident testing. FRA's fatality, passenger train, and hazardous materials criteria would remain unchanged.

During 1990 and 1991, 66 accidents involved damage between $500,000 and $1,000,000 (an average of 33 per year). Only 8 of these accidents (on average 4 each year) appear to have been primarily caused by human factors. These types of accidents tend to be derailments, predominantly caused by track or equipment. FRA believes that, where high-damage accidents are of sufficient public interest to warrant automatic post-accident testing, other qualifying criteria will generally apply (passenger train, release of hazardous materials accompanied by evacuation or injury, fatality, etc.). Even where other criteria do not apply, railroads will be required to conduct urine drug tests and breath alcohol tests if use or impairment is reasonably suspected. In addition, railroads will be authorized to conduct such tests if there is a reasonable belief that the particular employee played a role in the cause or severity of the accident. Comment is requested as to whether subpart D (urine, breath) testing should be required where there is such a belief. What logistical difficulties would be posed by such a requirement? To what extent would the complexity of testing requirements confound supervision seeking to implement the regulations?

Paragraph (a)(2)(ii) [Damage Threshold for Impact Accidents]

FRA would also raise the amount of railroad property damage for impact accidents, to include only those non-

injury accidents that cause $150,000 or more in damage. The National Transportation Safety Board (NTSB) uses the same reporting threshold (although the NTSB, unlike FRA, includes damage to lading). This damage threshold would allow FRA to capture data from virtually all of the events that the FRA and NTSB would investigate, while eliminating the requirement for testing following predominantly yard accidents.

Approximately 25 "impact accidents" each year fall between the existing $50,000 threshold and the proposed $150,000 threshold but do not qualify for testing under other criteria. Unlike accidents that qualify only under the $500,000 criterion, impact accidents are normally caused by human factors. However, many accidents that result in damage meeting the current $50,000 criterion are low speed switching events, often involving overspeed impact with standing equipment. Most of these events involving damage of less than $150,000 are not sufficiently serious to warrant investigation by either FRA or NTSB, given the effort expended by the railroad in its own investigation and other priorities of the investigating agencies. NTSB, for instance, investigates only about five accidents per year that fall in this range. Even though most impact accidents do involve human factors, few positive tests have resulted in recent years. Further, as in the case of the $500,000 criterion, railroads already have in place for-cause drug testing programs that would replace mandatory post-accident testing; and the other measures implemented through the Act will result in equally extensive use of breath alcohol testing in these circumstances. Again, comment is requested as to whether Subpart D testing should be required for these events (between the existing $50,000 threshold and the proposed $150,000 threshold) where there is a reasonable belief that the particular employee contributed to the accident, as well as to any complications or problems that might result.

Together, these two proposed changes in testing criteria would reduce by more than one-third the number of cases in which invasive blood testing would be required. FRA believes that railroads will conduct testing under subpart D or their own for-cause testing programs, and this data is required to be reported to FRA.

Paragraph (b) [Exceptions]

FRA solicits comment on whether accidents that otherwise qualify but are clearly attributable to vandalism should be excepted from post-accident testing. FRA believes that the fairness policy behind the existing exceptions for grade crossing and "Act of God" accidents applies equally here, since accidents caused by acts of vandalism are likewise wholly beyond the control of the employees involved. Consistent with the other exceptions, the proposed vandalism exception would hold railroad supervisors to § 219.201(c)'s reasonable inquiry/good faith judgment standard when making determinations.

Section 219.205 Sample Collection and Handling

In its final rule, FRA will amend the procedures for obtaining, marking, preserving and handling post-accident samples set forth in appendix C to part 219 to reflect the modifications to procedures, toxicology kits, forms, and instructions required to accommodate the urine split sample procedures mandated by the Act.

FRA appendix C procedures already "split" blood samples into two 10 milliliter tubes (each of which is sealed). Post-accident experience to date shows that the first 10 milliliter tube has almost always been sufficient for FRA purposes. However, there are scenarios, such as a multi-drug positive, that could require more than 10 milliliters of blood for confirmation. Obviously, if blood from the second tube is required for testing, that tube can no longer stay intact as a split sample. FRA realizes that special aliquoting procedures may conceivably be necessary for these rare instances, and solicits comment thereupon.

Section 219.211 Analysis and Follow-up

FRA will add language specifying that the MRO must conduct a review and make a report for each post-accident positive result. This is already being done under the existing rule, but the need for clarification has been brought to FRA's attention.

Additional clarifying and conforming changes to Subpart C are proposed in the rule text below.

Subpart D—Authorization to Test for Cause

Section 219.300 Mandatory Reasonable Suspicion Testing

FRA would change the title of subpart D from "Authorization to Test for Cause" to "Testing for Cause" to emphasize that reasonable suspicion testing is no longer discretionary. Under the Act, reasonable suspicion testing for alcohol and controlled substances changes from an authorized option to a mandatory program. The accident/incident and rule violation components of FRA's for cause testing program would remain optional for both alcohol and drug testing.

FRA expects that alcohol and drug reasonable suspicion testing will frequently interrelate, since supervisory observations will often be unable to target a particular substance as the medium of abuse. FRA suggests the following process: in cases that involve obvious alcoholic beverages on the breath or that involve symptoms consistent with either alcohol or controlled substance use, the employer should start with breath analysis. If the test indicates a BAC of .04 percent or more, the employer would have the option of conducting drug urinalysis. If the breath test is negative, the employer should conduct a urine drug test to continue the search for an explanation. (Cannabinoids and opiates sometimes produce symptoms that are also consistent with use of alcohol.) Where controlled substance use is specifically suspected, only a urine drug test should be conducted. (Additional guidance and examples can be found in the common preamble.)

FRA also proposes to add long-time decline in job performance as another factor that the employer may consider when determining whether to conduct a reasonable suspicion test on an employee. Indicators such as absenteeism, tardiness, and excessive and unsupported use of sick leave, have repeatedly been demonstrated to have a direct correlation with substance abuse. These could be considered, however, only in connection with contemporaneous observations of behavior or performance.

As in all other types of testing, FRA would specify a nine month disqualification from covered service for any employee who refused a reasonable suspicion test, since refusal would be a separate offense. Consistent with prior decisions on FRA-mandated testing, attachment of this definite consequence to a refusal serves a number of important purposes:

- It would provide a sanction for failure to provide a specimen as specifically required by agency rule (i.e., the offense would not go unpunished). This sanction could be carried out by the employer without any federal involvement.
- It would avoid serious conflict with employer policies, which typically treat refusal as insubordination (a serious rule violation in the railroad industry).
- It would encourage production of the specimen by the substance abuser, thus providing critical initial

information (confirmation that a controlled substance or prohibited concentration of alcohol was present and the identity of the controlled substance) to facilitate intervention by helping to break through the employee's barrier of denial.

FRA would require two trained supervisors, where feasible, to make a drug test reasonable suspicion determination. For alcohol, however, where the signs and symptoms of abuse are well-known, FRA believes that a determination by one trained supervisor that the criteria for reasonable suspicion exist is sufficient for testing. No pattern of abuse has been observed with regard to reasonable suspicion determinations under existing rules.

Supervisors will be expected to know the signs and symptoms of both alcohol abuse and drug abuse. (FRA notes that many substance abusers are polyabusers who abuse more than one controlled substance or combine alcohol abuse with drug abuse). Supervisors would be trained in accordance with the revised program requirements contained in § 219.11(g). FRA believes that most present supervisors have already received training of this kind.

Section 219.301 Testing for Reasonable Cause

As discussed above, FRA would retain accident/incident and rule violation testing as authorized options, while adding the criteria for mandatory reasonable suspicion to the circumstances that constitute reasonable cause for administration of breath alcohol tests and/or urine drug tests under this section. In addition, FRA would clarify the criteria for accident/incident testing for both alcohol and drugs, by emphasizing that this authority could be used to test only when a supervisory employee has "a reasonable belief, based on affirmative evidence of unsafe conduct, that the employee's acts or omissions contributed to the occurrence or severity of the accident or incident". FRA proposes including this phrase to stress that railroads may not use FRA accident/incident authority as a pretext for unnecessary testing. Some carriers have interpreted the current version of this section to mean that the mere happening of an accident constitutes grounds to test an employee, by assuming that the employee's failure to avoid or prevent the accident is equivalent to contributing to the accident. The proposed language would underscore that this is not an acceptable interpretation; the employer must be able to articulate a factual basis for believing the employee deliberately or negligently contributed to the occurrence or severity of the accident or incident before electing to test that employee.

Subpart F—Pre-employment Tests

Section 219.501 Pre-Employment Tests.

Paragraph (a)

Pursuant to the statutory mandate, FRA proposes to require pre-employment breath alcohol tests, in addition to urine drug tests. This section would be reorganized for clarity.

Paragraph (e):

FRA proposes a "grandfathering" provision to allow a covered employee who has "passed" both a pre-employment alcohol and a pre-employment drug test administered under the regulations of another DOT agency to be exempt from the testing requirements of § 219.501(a), if the railroad ensures (through a check of the records of any prior employer of whom the railroad has notice) that the employee has had no violations of this part or of the alcohol and drug misuse rules of another DOT agency within the last six months.

Subpart G—Random Testing Programs

FRA proposes various technical and conforming amendments to the random drug testing provisions and also proposes to add a new section addressing random alcohol testing.

Additionally, for both alcohol and drug random testing programs (§§ 219.601(b)(2) and 219.607(b)(2)), FRA proposes allowing any railroad that tests through a consortium to calculate its annual testing rate in one of two ways. FRA would allow a consortium to calculate for each member employer or calculate for the total number of covered employees subject to random testing by the consortium.

Section 219.607 Railroad Random Alcohol Testing Programs

FRA proposes, for the most part, to duplicate the notice requirements and criteria for plan approval that were used to implement random drug testing, including gradual submission and implementation schedules that would allow smaller carriers additional time to develop and execute random alcohol testing plans. However, FRA would not repeat the phase-in provisions of § 219.601(b)(2), which allowed each railroad to incrementally increase its random testing rate, so long as the railroad's program conducted testing at the required annualized rate (proposed to be set in the range of 10–50 percent) by the end of the first year of testing. At the time of random drug testing implementation, few carriers had even anecdotal experience in how to design and manage a random drug testing program, and technological capabilities were unknown. By contrast, alcohol testing technology has long been validated through widespread use by law enforcement, and all but the smallest or newest of carriers now have experience in overseeing substance abuse programs. FRA believes that carriers can achieve any reasonable testing rate at the inception of random alcohol testing without any phase-in; commenters are invited to discuss this assumption.

The short half-life of alcohol in the body will have to be considered. FRA proposes to offer railroads the flexibility to conduct random alcohol testing at any time the employee reports for work and at any time during the duty tour (except for when the employee is expressly relieved of any responsibility for the performance of safety-sensitive duties). For instance, some railroads perform all random drug tests at the end of the work day. To be effective with respect to employees reporting for duty, it may be necessary to require that at least some breath alcohol tests be performed at the beginning of the day or in the midst of the duty tour. Moreover, there may be situations in which it is not possible to conduct a urine collection and a breath test within the allowed hours of service. Certain railroads may find it more advantageous from the point of view of deterrence and efficiency to do "sweep" type random alcohol tests requiring all employees marking off duty or reporting for duty at a given point, on any given day, to be tested (with the location and date selected by use of objective and neutral criteria).

Another option that FRA is considering would be to adopt a modified version of the Federal Highway Administration's proposed § 382.809 (published in their alcohol NPRM elsewhere in today's Federal Register) which would limit an employer's time period within which to notify an employee of his or her selection for random alcohol testing selection to within 30 minutes before to 30 minutes after the employee operates a commercial motor vehicle. For rail purposes, FRA would allow the employer a notification period running from 30 minutes before to 30 minutes after the employee performs safety-sensitive functions, plus applicable travel time. FRA is interested in comment on the feasibility of this proposal. Is a one hour notification

window too short? How should travel time be defined and computed?

The important factor is that the date or time of the test should not be predictable from the point of view of the employee. It has been suggested that random tests should be encouraged at the beginning of the duty tour to promote deterrence; however, this ignores the scenario in which the employee reports sober to avoid detection but then proceeds to drink on the job. Pre-duty testing may be an obvious strategy for those employees who come into contact with the public and are closely observed during their duty tour, but the pattern of testing must be varied to be effective for most railroad employees.

Subpart H—Procedures and Safeguards for Urine Drug Testing and for Breath Alcohol Testing

Section 219.707 Review by MRO of Urine Drug Testing Results

Paragraph (d)

FRA proposes to delete the retest option contained in § 219.709, which allowed an employee 60 days to request that the remainder of his or her original specimen be retested under the procedures specified in that section. However, an employee whose test result indicates the presence of a controlled substance would still have 60 days (from when he or she received actual notice of the test results) to request a test of his or her split sample. The split sample is a second sample, taken at the same time as the original, and mandated by the Act.

FRA is concerned that a 72 hour period (the statutory minimum, and the period specified in the OST split sample procedures published in today's **Federal Register**) may be too short to allow an employee to obtain timely advice on how to exercise his or her rights, particularly where weekends, holidays, personal injuries and other potential delay factors are involved. Should the original 60-day period be retained, since all post-accident positive samples must be retained for two years anyway? FRA solicits comment on whether this additional protection for employees is necessary.

Subpart I—Annual Report

Section 219.801 Reporting of Alcohol Misuse Prevention Program Results in a Management Information System

As discussed earlier, FRA is proposing a comprehensive plan to obtain and analyze employer alcohol and drug program data. The information collection requirements for alcohol programs are included in this NPRM; FRA is publishing a separate NPRM elsewhere in today's **Federal Register** that contains comparable elements for drug program data and introduces the MIS in greater detail. Once a year, railroads would be required to submit a standard form containing both sets of data to FRA. (A new appendix D, which sets forth FRA's proposed mode-specific form, is included in the drug program MIS.) FRA would use this railroad feedback to evaluate its regulations to determine whether they are achieving their intended purpose.

Subpart J—Recordkeeping Requirements

Sections 219.901 and 219.903 Retention of Breath Alcohol Testing Records and Urine Drug Testing Records

FRA proposes similar recordkeeping retention requirements for alcohol and drug misuse prevention programs. The alcohol and drug record data formerly contained in § 219.713 would be integrated into both sets of recordkeeping.

Section 219.905 Access to Facilities and Records

FRA proposes to replace § 219.713's language on access to records with a new section following the discussion in the common preamble that would allow an employer to release an employee's alcohol and drug test records only with the written consent of the employee, with the exceptions of when access is requested by a DOT mode or when access is requested by a decisionmaker in a legal proceeding initiated by or on behalf of the employee.

Section 219.104 proceedings originate upon the employee's demand for a post-suspension hearing. Thus, while the employer may make the determination of whether to remove or merely suspend an employee, the employee is the initiator of the proceedings. This interpretation, consistent with the current language of 49 CFR part 40, affords due process protections to the employee while permitting the employer to disclose the employee's records to the decisionmaker. In keeping with common language proposed today to DOT agency alcohol programs, FRA requests comment as to whether the employer may also disclose an employee's records to the decisionmaker in related proceedings arising indirectly from the employee's violation of this part, such as Federal Employer's Liability Act or railroad unemployment compensation proceedings.

Request for Comments

Parties commenting on these proposed testing requirements are requested to file their comments with both the DOT's Docket in the part 40 rulemaking and with FRA's in this rulemaking. FRA also asks commenters to highlight any FRA-specific issues regarding the testing requirements. FRA will make available an opportunity for oral presentations, as required by section 202 of the Federal Railroad Safety Act of 1970, [at locations and dates to be determined].

FRA reserves the right to modify its proposals in light of comments received.

Executive Order 12291 and DOT Regulatory Policy and Procedures

This proposal is not "major" under Executive Order 12291. It is significant under the Department of Transportation's Regulatory Policy and Procedures.

FRA is proposing to require railroads to test, randomly, their employees performing safety sensitive functions to determine if these employees are working with dangerous levels of alcohol in their blood. The railroads would also be required to test new employees before allowing them to perform safety-sensitive functions. The regulation would also change reasonable suspicion testing from a permitted option to a required program, although that change is not expected to have significant costs or benefits.

Alcohol causes railroad accidents by limiting the intoxicated employee's ability to respond safely to the challenges of the job. Many accidents have been caused by alcohol. The FRA estimates that about two percent of all accident costs, excluding trespassers and grade crossing accidents, are related to alcohol abuse, and would not exist but for alcohol use.

The proposed rule would be effective because it would deter employees from drinking when they consider the consequences of being caught by a random test. The FRA estimates that half of current drinking would be deterred.

This rule will affect approximately 200 railroads and 80,000 workers. The rule will reduce accident costs by about one third of one percent, or one million dollars in the first year. It will cost about 2.5 million dollars in the first year. Over ten years it will cost, in terms of net present value, about 8.4 million dollars, and return benefits of 13.1 million dollars, for a benefit to cost ratio of 1.6 to 1. The program will cost about $62 per employee screened, including the cost of confirmation testing.

The FRA estimates that half of the tests will be administered by railroads, and the other half by third party contractors. There will be about 22,000 screening tests in the first year, 11,000 of which will be tested by contractors, and 11,000 by railroads.

The Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 was enacted by Congress to ensure that small entities are not unnecessarily and disproportionately burdened by Government regulations. FRA certifies that this proposal would not have a significant economic impact on a substantial number of small entities.

FRA specifically solicits comment on means to limit any reporting burden on small entities and on the impact of the proposed reporting requirements on small railroads not subject to the current requirements (certain railroads with fewer than 400,000 manhours of employment).

Federalism Implications

The proposed rulemaking action would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, FRA has determined that this notice does not have sufficient federalism implications to warrant preparation of a Federalism assessment.

Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 96–511) applies to this notice of proposed rulemaking because it changes several approved collections of information and initiates several new information collection requirements. As mentioned earlier, FRA will be publishing a Management Information System to collect both alcohol and drug misuse prevention program data. OST and FRA have estimated that for drug testing program data only, preparation of the annual report would require approximately 12–16 hours in the case of a small company with two million or less manhours, eight days-two weeks in the case of a medium company with two million to ten million manhours, and three weeks-two months in the case of a large company with in excess of ten million manhours. While there is no data available to corroborate the accuracy of these estimates, since MIS implementation has yet to take place, the manhours needed for railroads to institute a data system, and compile, maintain and prepare the information required for the alcohol data elements of the MIS system should be comparable. Parties are invited to submit written comments on this issue, and on the practicality of the new, comprehensive recordkeeping retention requirements that would replace § 219.713 for drug testing programs. Parties should address their views to Gloria D. Swanson, Federal Railroad Administration, room 8314, 400 Seventh Street, SW., Washington, DC 20590 and to the Regulatory Policy Branch (OMB No. 2130–526), Office of Management and Budget, New Executive Office Building, 726 Jackson Place, NW, Washington, DC 20530, Attention: Desk Officer for FRA. Copies of any such comments should also be submitted to the docket of this rulemaking at the address provided above, and to the docket for the DOT rulemaking published elsewhere in today's **Federal Register**.

FRA will request OMB approval of these revised information collection requirements. A **Federal Register** notice will be published when Paperwork Reduction Act approval is obtained. Current information collection requirements under part 219 were approved under OMB No. 2130–0526.

List of Subjects in 49 CFR Part 219

Alcohol and drug abuse, Railroad safety, Reporting and recordkeeping requirements.

Accordingly, for the reasons stated in the preamble, FRA proposes to amend 49 CFR part 219 as follows:

PART 219—CONTROL OF ALCOHOL AND DRUG USE

1. Authority for part 219 continues to read as follows:

Authority: 45 U.S.C. 431, 437, and 438, as amended; Pub. L. 100–342; and 49 CFR 1.49(m).

2. Part 219 is amended by removing the terms "EAP counselor" and "counselor" wherever they appear and by replacing them with "Substance abuse professional" and "professional" respectively; and by removing "$5,700 in 1989 and 1990" and by adding in its place "$6,300 in 1992" wherever this phrase appears in the text.

3. Section 219.3 is amended by revising paragraph (b)(2) to read as follows:

§ 219.3 Application.

* * * * *

(b) * * *

(b)(2) Subparts D, E, F, G, I, and J do not apply to a railroad that employs not more than 15 employees covered by the Hours of Service Act (45 U.S.C. 61–64b) and that does not operate on tracks of another railroad (or otherwise engage in joint operations with another railroad) except as necessary for purposes of interchange.

* * * * *

4. Section 219.5 is amended by adding, in alphabetical order, definitions for *alcohol concentration (or content), alcohol use, confirmatory test, consortium, DOT agency, initial alcohol test (or screening test), performing, refuse to submit,* and *substance abuse professional;* by removing the definition for *EAP counselor;* by revising the definitions for *alcohol, covered employee, covered service* and the first sentence of *independent,* as follows:

§ 219.5 Definitions.

As used in this part—

Alcohol means ethyl alcohol (ethanol).

Alcohol concentration (or content) means the alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath (as indicated by an evidential breath test under this part) or grams of alcohol per 100 milliliters of whole blood. When the indicated alcohol concentration of a covered employee on an initial breath alcohol test is different from an indicated alcohol concentration on a confirmatory test, the employee shall be considered to have the lower indicated concentration.

Alcohol use means the consumption of any beverage, mixture or preparation, including any medication, containing alcohol.

* * * * *

Confirmatory test means a second analytical procedure, separate from the screening test, to determine the concentration of alcohol in a covered employee's system. The confirmatory test may or may not use a different chemical principle from that of the screening test, but shall employ a scientifically recognized method of testing capable of providing quantitative data regarding alcohol concentration. For specific requirements concerning breath analysis testing devices, see Part 40 of this title.

Consortium means an entity, including a group or association of employers or contractors, that provides alcohol testing as required by this part or other DOT alcohol testing regulation and that acts on behalf of the employers.

* * * * *

Covered employee means a person who has been assigned to perform service subject to the Hours of Service Act (45 U.S.C. 61–64b) during a duty tour, whether or not the person has performed or is currently performing such service, any person who performs such service, and any person

responsible for or who undertakes direct supervision or control of the aforementioned individuals with respect to their safety-sensitive duties. (An employee is not "covered" within the meaning of this part exclusively by reason of being an employee for purposes of section 2(a)(3) of the Hours of Service Act, as amended (45 U.S.C. 62(a)(3)).) For the purposes of pre-employment/pre-duty testing only, the term covered employee includes a person applying to perform a safety-sensitive function.

Covered service means service for a railroad that is subject to the Hours of Service Act (45 U.S.C. 61–64b), or service that involves direct supervision or control of persons performing such service, but does not include any period the employee is relieved of all responsibilities and is free to come and go without restriction.

* * * * *

DOT Agency means an agency (or "operating administration") of the United States Department of Transportation administering regulations requiring alcohol or controlled substance testing (14 CFR parts 65, 121, and 135; 49 CFR parts 199, 219, 382 and 654) in accordance with part 40 of this title.

* * * * *

Independent with respect to a medical facility, means not under the ownership or control of the railroad and not operated or staffed by a salaried officer or employee of the railroad. * * *

* * * * *

Initial alcohol test (or screening test) means an analytical procedure to determine whether a covered employee may have a prohibited concentration of alcohol in his or her system.

* * * * *

Performing (a safety-sensitive function): an employee is considered to be performing a safety-sensitive function during any period in which he or she is on duty and is actually performing, standing by to perform, or immediately available to perform such functions.

* * * * *

Refuse to submit (to an alcohol test) means that a covered employee fails to provide breath for testing without a valid medical explanation after he or she has received notice of the requirement to be tested in accordance with the provisions of this part, or engages in conduct that clearly obstructs the collection process.

* * * * *

Substance abuse professional means a licensed physician (Medical Doctor or Doctor of Osteopathy), or a licensed or certified psychologist, social worker, or employee assistance professional with knowledge of and clinical experience in the diagnosis and treatment of alcohol and drug related disorders.

* * * * *

5. In § 219.9, amend paragraph (a) by revising the first sentence as follows:

§ 219.9 Responsibility for compliance.

(a) Any person (including but not limited to a railroad; any manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor providing goods or services to a railroad; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor) who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least $500 and not more than $10,000 per violation, except that: Penalties may be assessed against individuals only for willful violations; where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury, or has caused death or injury, a penalty not to exceed $20,000 per violation may be assessed; and the standard of liability for a railroad will vary depending upon the requirement involved. * * *

(b) * * *

6. Section 219.11 is amended by revising paragraph (b)(2); by redesignating existing paragraph (g) as paragraph (h); and by adding paragraphs (c)(4) and (g) as follows:

§ 219.11 General conditions for chemical tests.

* * * * *

(b)(1) * * *

(2) In any case where an employee has sustained a personal injury and is subject to alcohol or drug testing under this part, necessary medical treatment shall be accorded priority over provision of the breath or body fluid sample. No employee who is unable to urinate normally (based on the judgment of a medical professional that catheterization would be required) as a result of a personal injury, resulting medical treatment, or renal failure shall be required to provide a urine sample. Nothing in this section shall bar use of a urine specimen made available as a result of catheterization undertaken for medical purposes, provided the circumstances of such collection are fully documented and the specimen is otherwise handled in accordance with the applicable requirements of this title.

* * * * *

(c) * * *

(4) The results of any breath tests for alcohol conducted by or for the treating facility.

* * * * *

(g) Each supervisor responsible for covered employees (except a working supervisor within the definition of coworker under this part) shall be trained in the signs and symptoms of alcohol and drug influence, intoxication and misuse consistent with a program of instruction on file with FRA under part 217 of this part. Such a program shall, at a minimum provide information concerning the acute behavioral and apparent physiological effects of alcohol and the major drug groups on the controlled substances list. The program shall also provide training on the qualifying criteria for post-accident testing contained in subpart C of this part, and the role of the supervisor in post-accident collections described in subpart C and appendix C of this part. The duration of such training shall be not less than 3 hours.

* * * * *

§ 219.15 [Reserved]

7. Section 219.15 is removed and reserved.

8. Section 219.23 is amended by revising the section heading; revising paragraphs (a) and (b); and adding paragraphs (d) through (g), so that the section reads as follows:

§ 219.23 Railroad policies.

(a) Whenever a breath or body fluid test is required of an employee under this part, the railroad shall provide clear and unequivocal written notice to the employee that the test is being required under Federal Railroad Administration regulations. Use of the mandated DOT form for urine drug testing or breath analysis satisfies the requirements of this paragraph.

(b) Whenever a breath or body fluid test is required of an employee under this part, the railroad shall provide clear, unequivocal written notice of the basis or bases upon which the test is required (e.g., reasonable suspicion, violation of a specified operating/safety rule enumerated in subpart D, random selection, follow-up, etc.). Completion of the alcohol testing form or urine custody and control form indicating the basis of the test (prior to providing a copy to the employee) satisfies the requirement of this paragraph.

* * * * *

(d) Each covered employee who has engaged in conduct prohibited by

subpart B of this part shall be advised by the railroad of the resources available to the employee in evaluating and resolving problems associated with the misuse of alcohol and controlled substances, including the names, addresses, and telephone numbers of substance abuse professionals and counseling and treatment programs.

(e) Each railroad shall provide educational materials that explain the requirements of this part, and the railroad's policies and procedures with respect to meeting those requirements. Each railroad shall provide written notice to every covered employee and to representatives of that employee's class or craft (if applicable) of the availability of this information.

(f) *Required content.* The materials to be made available to employees shall include detailed discussion of at least the following:

(1) The identity of the person designated by the railroad to answer employee questions about the materials.

(2) The classes or crafts of employees who are subject to the provisions of this part.

(3) Sufficient information about the safety-sensitive functions performed by those employees to make clear that the period of the work day the covered employee is required to be in compliance with this part is that period when the employee is on duty and is required to perform or is available to perform covered service.

(4) A railroad utilizing the accident/incident and rule violation reasonable cause testing authority provided by this part shall provide prior notice (which may be combined with the notice required by §§ 219.601(d)(1) and 219.607(d)(1)), to covered employees of the circumstances under which they will be subject to testing.

(5) The circumstances under which a covered employee will be tested under this part.

(6) The procedures that will be used to test for the presence of alcohol and controlled substances, protect the employee and the integrity of the sample, safeguard the validity of the test results, and ensure that those results are attributed to the correct employee.

(7) The requirement that a covered employee submit to alcohol and drug tests administered in accordance with this part.

(8) An explanation of what constitutes a refusal to submit to an alcohol or drug test and the attendant consequences.

(9) The consequences for covered employees found to have violated subpart B of this part, including the requirement that the employee be removed immediately from safety-sensitive functions, and the procedures under § 219.104.

(10) The consequences for covered employees found to have an alcohol concentration of .02 or greater but less than .04.

(g) *Optional provisions.* The materials supplied to employees may also include information on additional railroad policies with respect to the use or possession of alcohol and drugs, including any consequences for an employee found to have a specific alcohol concentration, that are based on the railroad's authority independent of this part. Any such additional policies or consequences shall be clearly and obviously described as being based on independent authority.

9. Section 219.101 is amended by revising paragraph (a)(2)(ii); and adding a new paragraph (a)(3) as follows:

§ 219.101 Alcohol and drug use prohibited.

(a) * * *

(2) * * *

(ii) Having .04 or more alcohol concentration in the breath or blood; or

* * * * *

(3) No employee may use alcohol for whichever is the lesser of the following periods:

(i) Within four hours of reporting for covered service; or

(ii) After receiving notice to report for covered service.

* * * * *

10. Section 219.104 is amended by revising paragraphs (a), (d), and (e); and adding paragraphs (f) and (g) as follows:

§ 219.104 Responsive action.

(a) *Removal from covered service.* (1) If the railroad determines that an employee has violated § 219.101 or § 219.102, the railroad shall immediately remove the employee from covered service and the procedures described in paragraphs (b) through (e) of this section shall apply.

(2) If an employee refuses to provide breath or a body fluid sample or samples when required to by the railroad under a mandatory provision of this part, the railroad shall immediately remove the employee from covered service, and the procedures described in paragraphs (b) through (e) of this section shall apply.

(3) This section and the information requirements listed in § 219.105(c) do not apply to applicants who refuse to submit to a pre-employment/pre-duty test or who have a pre-employment/pre-duty test with a result indicating either an alcohol concentration equal to or greater than .04, or the misuse of controlled substances.

* * * * *

(d) *Return to covered service.* An employee who has been determined to have violated § 219.101 or § 219.102 or who refused to cooperate in a breath or body fluid test under this part shall not be returned to covered service unless the employee has—

(1) Been evaluated by a substance abuse professional to determine if the employee is affected by a psychological or physical dependence on alcohol or one or more controlled substances or by another identifiable and treatable mental or physical disorder involving misuse of alcohol or drugs as a primary manifestation;

(2) Been evaluated by a substance abuse professional to determine that the employee has properly followed the prescribed rehabilitation program; and

(3)(i) Presented a urine sample for testing under subpart H of this part that tested negative for controlled substances assayed (in the case of an employee who has been determined to have violated a prohibition of § 219.101 or § 219.102 regarding possession or misuse of controlled substances or who refused to provide a body fluid sample or samples when required to by the railroad under a mandatory provision of this part); or

(ii) Presented breath for testing under subpart H of this part that indicated an alcohol concentration of less than .02 (in the case of an employee who has been determined to have violated a prohibition of § 219.101 regarding possession or misuse of alcohol or who refused to provide breath when required to by the railroad under a mandatory provision of this part).

(e) *Follow-up testing.* An employee returned to service under the above-stated conditions shall continue in any program of counseling or treatment deemed necessary by the substance abuse professional and shall be subject to a reasonable program of follow-up testing without prior notice for a period of not more than 60 months following return to service, with a minimum of six tests to be performed on an unannounced basis during the first 12 months of follow-up testing. Such tests shall be performed consistent with the requirements of subpart H of this part.

(1) If the employee has been determined to have violated a prohibition of § 219.101 or § 219.102 regarding possession or misuse of controlled substances, or if the employee refused to provide a body fluid sample or samples when required to by the railroad under a mandatory provision of this part, the employee shall be subject to urine drug testing as specified in this section.

(2) If the employee has been determined to have violated a

prohibition of § 219.101 regarding possession or misuse of alcohol, or if the employee refused to provide breath when required to by the railroad under a mandatory provision of this part, the employee shall be subject to breath alcohol testing as specified in this section.

(f) No covered employee tested under the provisions of this part who is found to have an alcohol concentration of .02 or greater but less than .04 shall perform or continue to perform safety-sensitive functions for a railroad, nor shall a railroad permit the employee to perform or continue to perform safety-sensitive functions, until:

(1) The employee's alcohol concentration measures less than .02; or

(2) The start of the employee's next regularly scheduled duty period, but not less than eight hours following administration of the test.

(g) This section does not apply to actions based on breath or body fluid tests for alcohol or drugs that are conducted exclusively under authority other than that provided in this part (*e.g.*, testing under a company medical policy, for-cause testing policy wholly independent of subpart D of this part, or testing under a labor agreement).

11. Part 219 is amended by adding § 219.107 as follows:

§ 219.107 Consequences of unlawful refusal.

(a) An employee who refuses to provide breath or a body fluid sample or samples when required to by the railroad under a mandatory provision of this part shall be deemed disqualified for a period of nine (9) months.

(b) Prior to or upon withdrawing the employee from covered service under this section, the railroad shall provide notice of the reason for this action, and the procedures described in § 219.104(c) shall apply.

(c) The disqualification required by this section shall apply with respect to employment in covered service by any railroad with notice of such disqualification.

(d) The requirement of disqualification for nine (9) months does not limit any discretion on the part of the railroad to impose additional sanctions for the same or related conduct.

(e) Upon the expiration of the 9-month period described in this section, a railroad may permit the employee to return to covered service only under the same conditions specified in § 219.104(d), and the employee shall be subject to follow-up tests, as provided by that section.

12. In § 219.201, by revising paragraphs (a)(1)(iii) and (a)(2)(ii), as follows:

§ 219.201 Events for which testing is required.

(a) * * *

(1) * * *

(iii) Damage to railroad property of $1,000,000 or more.

(2) * * *

(ii) Damage to railroad property of $150,000 or more.

* * * * *

13. Section 219.203 is amended by revising paragraphs (a)(1), (c)(2), and revising the first sentence of paragraph (d)(2), as follows:

§ 219.203 Responsibilities of railroads and employees.

(a) *Employees tested.* (1) Following each accident and incident described in § 219.201, the railroad (or railroads) shall take all practicable steps to assure that all covered employees of the railroad directly involved in the accident or incident provide, for toxicological testing by FRA, two blood samples, consisting of a primary sample and a split sample, and two urine samples, consisting of a primary sample and a split sample (following the procedures described in this subpart and appendix C) to be retained at the laboratory designated in appendix B of this part. Such employees shall cooperate in the provision of samples as described in this subpart and appendix C.

(c) * * *

(2) In the case of an injured employee, the railroad shall request the treating medical facility to obtain the required samples.

(d) * * *

(2) If an injured employee is unconscious or otherwise unable to evidence consent to the procedure and the treating medical facility declines to obtain blood samples after having been acquainted with the requirements of this subpart, the railroad shall immediately notify FRA by toll free telephone (800–424–0201), stating the employee's name, the medical facility, its location, the name of the appropriate decisional authority at the medical facility, and the telephone number at which that person can be reached. * * *

* * * * *

14. Section 219.205 is amended by revising paragraph (a) as follows:

§ 219.205 Sample collection and handling.

(a) *General.* Samples shall be obtained, marked, preserved, handled, and made available to FRA consistent with the requirements of this section, and the technical specifications set forth in Appendix C to this part.

* * * * *

15. Section 219.209 is amended by adding a new last sentence to paragraph (a)(1); and by revising the first sentence of paragraph (b), as follows:

§ 219.209 Reports of tests and refusals.

(a)(1) * * * Notification shall be provided to the Office of Safety, FRA, at (202) 366–0501; an answering machine will record any notification calls made to this number outside of the Federal work week (8:30 a.m. to 5 p.m. EST or EDT).

* * * * *

(b) If the railroad is unable, as a result of non-cooperation of an employee or for any other reason, to obtain samples and cause them to be provided to FRA as required by this subpart, the railroad shall make a concise narrative report of the reason for such failure and, if appropriate, any action taken in response to the cause of such failure. * * *

* * * * *

16. Section 219.211 is amended by revising the second sentence of paragraph (a); by revising the last sentence of paragraph (c); by revising the last sentence of paragraph (d); and by revising paragraphs (e), (h), and (i) as follows:

§ 219.211 Analysis and follow-up.

(a) * * * Samples are analyzed for alcohol and controlled substances specified by FRA under protocols specified by FRA and accepted by the Department of Health and Human Services. * * *

* * * * *

(c) * * * The Federal Railroad Administration shall not be bound by the railroad Medical Review Officer's determination, but that determination will be considered by FRA in relation to the accident/incident investigation and with respect to any enforcement action under consideration.

(d) * * * (However, as further provided in this section, FRA may provide results of testing under this subpart and supporting documentation to the National Transportation Safety Board.)

(e) An employee may respond in writing to the results of the test prior to the preparation of any final investigation report concerning the accident or incident. An employee wishing to respond shall do so by letter addressed to the Alcohol/Drug Program Manager, Office of Safety, FRA, 400 Seventh Street, SW., Washington, DC 20590, within 45 days of receipt of the

test results. Any such submission shall refer to the accident date, railroad and location, shall state the position occupied by the employee on the date of the accident/incident, and shall identify any information contained therein that the employee requests be withheld from public disclosure on grounds of personal privacy (but the decision whether to honor such request shall be made by the FRA on the basis of controlling law).

* * * * *

(h) Except as provided in § 219.201 (with respect to nonqualifying events), each sample (including each split sample) provided under this subpart is retained for not less than three months following the date of the accident or incident (two years from the date of the accident or incident in the case of a sample testing positive for alcohol or a controlled substance). Post-mortem specimens may be made available to the National Transportation Safety Board (on request).

(i) An employee (donor) may, within 60 days of the date of the toxicology report, request that the employee's split blood and/or urine sample be tested by the designated laboratory or by another laboratory certified by the Department of Health and Human Services under that Department's Guidelines for Federal Workplace Drug Testing Programs that has available an appropriate, validated assay for the fluid and compound declared positive. Since some analysts may deteriorate during storage, detected levels of the compound shall, as technically appropriate, be reported and considered corroborative of the original test result. Any request for a split sample test shall be in writing, specify the railroad, accident date and location, be signed by the employee/donor, be addressed to the Associate Administrator for Safety, FRA, Washington, DC 20590, and be designated "Administratively Confidential: Attention Alcohol/Drug Program Manager."

17. Section 219.213 is amended by revising paragraphs (a) and (b) as follows:

§ 219.213 Unlawful refusals; consequences.

(a) *Disqualification.* (1) An employee who refuses to cooperate in providing blood or urine samples following an accident or incident specified in this subpart shall be withdrawn from covered service and shall be deemed disqualified for covered service for a period of nine (9) months in accordance with the conditions specified in § 219.107.

(b) *Procedures.* Prior to or upon withdrawing the employee from covered service under this section, the railroad shall provide notice of the reason for this action and an opportunity for hearing before a presiding officer other than the charging official. The employee shall be entitled to the procedural protections set out in § 219.104(d).

* * * * *

18. Subpart D is amended by revising the heading of the subpart and adding § 219.300 as follows:

Subpart D—Testing For Cause

§ 219.300 Mandatory reasonable suspicion testing.

(a) *Requirements.* (1) A railroad shall require a covered employee to submit to a breath alcohol test when the railroad has reasonable suspicion to believe that the employee has violated any prohibition of subpart B of this part concerning alcohol. The railroad's determination that reasonable suspicion exists to require the covered employee to undergo an alcohol test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the employee.

(2) A railroad shall require a covered employee to submit to a urine drug test when the railroad has reasonable suspicion to believe that the employee has violated the prohibitions of subpart B of this part concerning controlled substances. The railroad's determination that reasonable suspicion exists to require the covered employee to undergo a drug test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the employee. Such observations may include indications of the chronic and withdrawal effects of drugs.

(3) In weighing the significance of such contemporaneous observations, the railroad may also consider any pertinent information concerning long-term decline in job performance (*e.g.*, absenteeism, tardiness, excessive and unsupported use of sick leave).

(b) When the railroad has reasonable suspicion to believe that the employee has violated the prohibitions of subpart B concerning use of alcohol or controlled substances, or both, such that the employee may be currently under the influence of or impaired by alcohol, by a controlled substance, or by alcohol in combination with a controlled substance, the railroad shall promptly conduct a breath alcohol test. If the breath alcohol test does not yield evidence of a violation of § 219.101, then the railroad shall promptly require the employee to submit to a urine drug test.

(c)(1) With respect to a breath alcohol test, one supervisor trained in accordance with § 219.11(g) may make the reasonable suspicion determination. The supervisor who makes the determination to test an employee may not also serve as the breath alcohol technician for purposes of conducting the breath alcohol test on that employee.

(2) With respect to a urine drug test, at least two supervisors trained in accordance with § 219.11(g) shall be required to make the reasonable suspicion determination.

(d) Nothing in this section shall be construed to require the conduct of breath alcohol testing or urine drug testing when the employee is apparently in need of immediate medical attention.

18. Section 219.301 is amended by removing and reserving paragraph (b)(1); revising the introductory text to paragraphs (b), (b)(2) and (c) introductory text; and removing paragraphs (f) and (g), as follows:

§ 219.301 Testing for reasonable cause.

(a) * * *

(b) *Reasonable cause for breath tests.* In addition to reasonable suspicion as described in § 219.300, the following circumstances constitute reasonable cause for the administration of breath alcohol tests under this section:

(1) [Reserved].

(2) *Accident/incident.* The employee has been involved in an accident or incident reportable under part 225 of this title, and a supervisory employee of the railroad has a reasonable belief, based on affirmative evidence of unsafe conduct, that the employee's acts or omissions contributed to the occurrence or severity of the accident or incident; or

(3) * * *

(c) *Reasonable cause for urine test.* In addition to reasonable suspicion as described in § 219.300, each of the conditions set forth in paragraphs (b)(2) ("accident/incident") and (b)(3) ("rule violation") of this section as constituting reasonable cause for breath alcohol testing also constitutes reasonable cause with respect to urine drug testing.

* * * * *

19. Part 219 is amended by adding a new § 219.302 as follows:

§ 219.302 Prompt sample collection; time limitation.

(a) Testing under this subpart may only be conducted promptly following the observations or events upon which the testing decision is based, consistent with the need to protect life and property.

(b) No employee shall be required to participate in breath alcohol or urine drug testing under this subsection after the expiration of an eight hour period from—

(1) The time of the observations or other events described in this section; or

(2) In the case of an accident/incident, the time a responsible railroad supervisor receives notice of the event providing reasonable cause for conduct of the test.

(c) An employee may not be tested under this subpart if that employee has been released from duty under the normal procedures of the railroad. An employee who has been transported to receive medical care is not released from duty for purposes of this section. Nothing in this section prohibits the subsequent testing of an employee who has failed to remain available for testing as required (*i.e.*, who is absent without leave).

(d) As used in this subpart a "responsible railroad supervisor" means any responsible line supervisor (*e.g.*, a trainmaster or road foreman of engines) or superior official in authority over the employee to be tested.

(e) In the case of a urine drug test, the eight-hour requirement is satisfied if the employee has been delivered to the collection site (where the collector is present) and the request has been made to commence collection of the urine specimens within that period.

(f) Section 219.23 prescribes the notice to an employee that is required to provide breath or a body fluid sample under this part.

20. Part 219 is amended by revising § 219.303 to read as follows:

§ 219.303 Breath test procedures and safeguards.

The conduct of breath alcohol testing under this subpart is governed by subpart H of this part and part 40 of subtitle A of this title.

§§ 219.307 and 219.309 [Removed]

21. Part 219 is amended by removing §§ 219.307 and 219.309.

22. Subpart F is amended by revising the subpart heading to read as follows:

Subpart F—Pre-employment Tests

23. Section 219.501 is revised to read as follows:

§ 219.501 Pre-employment tests.

(a) Prior to the first time a covered employee performs safety-sensitive functions for an employer, the employee shall undergo testing for alcohol and drugs. No railroad shall allow a covered employee to perform safety-sensitive functions, unless the employee has been administered an alcohol test with a result indicating an alcohol concentration less than .04 and has been administered a test for drugs with a result that did not indicate the misuse of controlled substances. If a pre-employment/pre-duty test result under this section indicates an alcohol content of .02 or greater but less than .04, the provisions of § 219.104(f) shall apply. This requirement shall apply to final applicants for employment and to employees seeking to transfer for the first time from non-covered service to duties involving covered service. The tests shall be accomplished through breath analysis and analysis of urine samples.

(b) The conduct of breath alcohol testing and urine drug testing under this subpart is governed by subpart H of this part and part 40 of subtitle A of this title.

(c) As used in subpart H with respect to a test required under this subpart, the term covered employee includes an applicant for pre-employment and pre-duty testing only. In the case of an applicant who declines to be tested and withdraws the application for employment, no record shall be maintained of the declination.

(d) A railroad is not required to administer an alcohol and drug test required by paragraph (a) of this section, if:

(1) The employee has undergone an alcohol test required by this section or the alcohol misuse regulation of another DOT agency within the previous six months, with a result indicating an alcohol concentration less than .04; and

(2) The employee has undergone a drug test required by this section or the drug misuse regulation of another DOT agency within the previous six months, with a result that did not indicate the misuse of a controlled substance; and

(3) The railroad ensures that no prior employer of the covered employee of whom the railroad has knowledge has records of a violation of this subpart or the alcohol and drug misuse regulations of another DOT agency within the previous six months.

24. Part 219 is amended by revising § 219.503 to read as follows

§ 219.503 Notification; records.

The railroad shall provide for medical review of the urine drug test results as provided in subpart H of this part. The railroad shall notify the applicant of the results of the urine and breath tests in the same manner as provided for employees in subpart H. Records shall be maintained confidentially and shall be retained in the same manner as required under subpart J for employee test records, except that such records need not reflect the identity of an applicant whose application for employment in covered service was denied.

§ 219.505 [Amended]

25. Section 219.505 is amended by revising the section heading to read "Refusals," removing the designation from paragraph (a), and removing paragraph (b).

26. Part 219 is amended by revising the heading of Subpart G as follows:

Subpart G—Random Alcohol and Drug Testing Programs

27. Section 219.601 is amended by revising paragraph (b)(2)(iii) and the undesignated paragraph following it, revising (b)(7), and revising the first two sentences of paragraph (c) as follows:

§ 219.601 Railroad random drug testing programs.

* * * * *

(b) * * *

(2) * * *

(iii) * * *

During each subsequent 12-month period the program shall select for testing a sufficient number of employees so that the number of tests conducted will equal at least 50 percent of the number of covered employees. Annualized percentage rates shall be determined by reference to the total number of covered employees employed by the railroad at the beginning of the particular twelve-month period or by an alternate method specified in the plan approved by the Associate Administrator for Safety. If the railroad conducts random testing through a consortium, the annual rate may be calculated for each individual employer or for the total number of covered employees subject to random testing by the consortium.

* * * * *

(7) Each time an employee is notified for random drug testing the employee will be informed that selection was made on a random basis.

(c) *Approval.* The Associate Administrator for Safety will notify the railroad in writing whether the program is approved as consistent with the criteria set forth in this part. If the Associate Administrator for Safety determines that the program does not conform to those criteria, the Associate Administrator for Safety will inform the railroad of any matters preventing approval of the program, with specific explanation as to necessary revisions.

* * *

* * * * *

§ 219.603 [Amended]

28. Section 219.603 is amended by revising the section heading to read "Participation in drug testing."; by removing the designation and heading "(a) *Participation*" from paragraph (a); and removing paragraphs (b) and (c).

29. Section 219.605 is amended by redesignating paragraph (b) as paragraph (c); adding a new final sentence to newly designated paragraph (c), and adding a new paragraph (b) as follows:

§ 219.605 Positive drug test results; procedures.

(a) * * *

(b) If the test result of the primary sample is positive, the employee may request that the split sample be tested in accordance with the procedures outlined in part 40 of this title.

(c) * * * The responsive action required in § 219.104 is not stayed pending the result of the test of the split sample.

30. Part 219 is amended by adding a new § 219.607 as follows:

§ 219.607 Railroad random alcohol testing programs.

(a) Each railroad shall submit for FRA approval a random alcohol testing program meeting the requirements of this subpart. A Class I railroad (including the National Railroad Passenger Corporation) or a railroad providing commuter passenger service shall submit such a program not later than [*6 months after publication of the final rule*]. A Class II railroad shall submit such a program not later than [*12 months after publication of the final rule*]. A Class III railroad (including a switching and terminal or other railroad not otherwise classified) shall submit such a program not later than [*18 months after publication of the final rule*]. A railroad commencing operations after the pertinent date specified in this paragraph shall submit a random alcohol testing program not later than 30 days prior to such commencement. The program shall be submitted to the Associate Administrator for Safety, FRA, for review and approval. If, after approval, a railroad desires to amend the random alcohol testing program implemented under this subpart, the railroad shall file with FRA a notice of such amendment at least 30 days prior to the intended effective date of such action. A program responsive to the requirements of this section or any amendment to the program shall not be implemented prior to approval.

(b) *Form of programs.* Random alcohol testing programs submitted by or on behalf of each railroad under this subpart shall meet the following criteria, and the railroad and its managers, supervisors, officials and other employees and agents shall conform to such criteria in implementing the program:

(1) Selection of covered employees for testing shall be made by a method employing objective, neutral criteria which ensure that every covered employee has a substantially equal statistical chance of being selected within a specified time frame. The method may not permit subjective factors to play a role in selection, *i.e.*, no employee may be selected as the result of the exercise of discretion by the railroad. The selection method shall be capable of verification with respect to the randomness of the selection process, and any records necessary to document random selection shall be retained for not less than 24 months from the date upon which the particular samples were collected.

(2) During each 12-month period the program shall select for testing a sufficient number of employees so that the number of tests conducted will equal at least (10–50) percent of the number of covered employees, with testing to be spread reasonably through the 12-month period. Annualized percentage rates shall be determined by reference to the total number of covered employees employed by the railroad at the beginning of the particular twelve-month period or by an alternate method specified in the plan approved by the Associate Administrator for Safety. If the railroad conducts random testing through a consortium, the annual rate may be calculated for each individual employer or for the total number of covered employees subject to random testing by the consortium.

(3) Railroad random testing programs shall ensure to the maximum extent practicable that each covered employee shall perceive the possibility that a random alcohol test may be required at any time the employee reports for work and at any time during the duty tour (except any period when the employee is expressly relieved of any responsibility for performance of safety-sensitive duties).

(4) Testing shall be conducted promptly, as provided in § 219.715(a).

(5) The program shall include testing procedures and safeguards, and, consistent with this part, procedures for action based on tests where the employee is found to have violated § 219.101.

(6) An employee shall be subject to testing only while on duty. Only employees who perform covered service for the railroad shall be subject to testing under this part. In the case of employees who during some duty tours perform covered service and during others do not, the railroad program shall specify the extent to which, and the circumstances under which they shall be subject to testing. To the extent practical within the limitations of this part and in the context of the railroad's operations, the railroad program shall provide that employees shall be subject to the possibility of random testing on any day they actually perform covered service.

(7) Each time an employee is notified for random alcohol testing the employee will be informed that selection was made on a random basis.

(c) *Approval.* The Associate Administrator for Safety will notify the railroad in writing whether the program is approved as consistent with the criteria set forth in this part. If the Associate Administrator for Safety determines that the program does not conform to those criteria, the Associate Administrator for Safety will inform the railroad of any matters preventing approval of the program, with specific explanation as to necessary revisions. The railroad shall resubmit its program with the required revisions within 30 days of such notice. Failure to resubmit the program with the necessary revisions will be considered a failure to implement a program under this subpart.

(d) *Implementation.*

(1) No later than 45 days prior to commencement of random alcohol testing, the railroad shall publish to each of its covered employees, individually, a written notice that they will be subject to random alcohol testing under this part. Such notice shall state the date for commencement of the program, shall state that the selection of employees for testing will be on a strictly random basis, shall describe the consequences of a determination that the employee has violated § 219.101 or any applicable railroad rule, and shall inform the employee of the employee's rights under subpart E of this part. A copy of the notice shall be provided to each new covered employee on or before the employee's initial date of service. Since knowledge of Federal law is presumed, nothing in this paragraph creates a defense to a violation of § 219.101. This notice may be combined with the notice or policy statement required by § 219.23.

(2) Each Class I railroad (including the National Railroad Passenger Corporation) and each railroad providing commuter passenger service shall implement its approved random alcohol testing program not later than [*12 months after publication of the final*

rule]. Each Class II railroad shall implement its approved random testing program not later than [*18 months after publication of the final rule*]. Each Class III railroad (including a switching and terminal or other railroad not otherwise classified) shall implement its approved random testing program not later than [*24 months after publication of the final rule*]. In the case of a railroad commencing operations after the pertinent date set forth in paragraph (a) of this section for filing of a program, the railroad shall implement its approved random testing program not later than the expiration of 60 days from approval by the Administrator or by the pertinent date set forth in this paragraph, whichever is later.

31. By adding § 219.609 as follows:

§ 219.609 Participation in alcohol testing.

A railroad shall, under the conditions specified in this subpart and subpart H of this part, require a covered employee selected through the random testing program to cooperate in breath testing to determine compliance with § 219.101, and the employee shall provide the required breath and complete the required paperwork and certifications. Compliance by the employee shall be excused only in the case of a documented medical or family emergency.

32. Part 219 is amended by adding § 219.611 as follows:

§ 219.611 Test result indicating prohibited alcohol concentration; procedures.

Procedures for administrative handling by the railroad in the event an employee's confirmatory test indicates an alcohol concentration of .04 or greater are set forth in § 219.104.

33. Part 219 is amended by revising the heading of subpart H as follows:

"Subpart H—Procedures and Safeguards for Urine Drug Testing and for Breath Alcohol Testing"

§ 219.703 [Amended]

34. Part 219 is amended by revising the heading of § 219.703 to read *"Drug testing procedures."*

35. Section 219.707 is amended by revising the section heading and the first sentence of paragraph (a); by redesignating existing paragraph (d) as paragraph (e); and by adding a new paragraph (d) as follows:

§ 219.707 Review by MRO of Urine Drug Testing Results.

(a) Urine drug test results reported positive by the laboratory as provided in part 40 of this title shall not be deemed positive or disseminated to any person (other than to the employee tested in a medical interview, if conducted) until they are reviewed by a Medical Review Officer (MRO) of the railroad as required by part 40 of this title and this section.

* * *

(b) * * *

(d) The MRO shall direct the employee's split sample to be tested in accordance with the procedures specified in 49 CFR part 40 if, within 60 days of the employee's having actual notice that he or she tested positive, the employee makes such a request to the MRO.

* * * * *

§§ 219.709 and 219.713 [Reserved]

36. Part 219 is amended by removing and reserving §§ 219.709 and 219.713.

37. Part 219 is amended by adding § 219.715 as follows:

§ 219.715 Alcohol testing procedures.

(a) Each covered employee who is notified of selection for breath alcohol testing and who is not performing a safety-sensitive function at the time of notification shall proceed to the testing site immediately. The railroad shall ensure that an employee who is performing a safety-sensitive function at the time of notification shall, as soon as possible without affecting safety, cease to perform the safety-sensitive function and proceed to the testing site.

(b) Each railroad shall ensure that all breath alcohol testing conducted under this part complies with the procedures set forth in part 40 of this title. The provisions of part 40 of this title that address alcohol testing are made applicable to employers by this part.

38. Part 219 is amended by adding a new subpart I as follows:

Subpart I—Annual Report

§ 219.801 Reporting alcohol misuse prevention program results in a management information system.

(a) Each railroad shall submit to FRA an annual report covering the calendar year, summarizing the results of its alcohol misuse prevention program.

(b) Each railroad that is subject to more than one DOT agency alcohol regulation shall identify each employee covered by the regulations of more than one DOT agency. The identification will be by the total number and category of covered functions. Prior to conducting any alcohol test on a covered employee subject to the regulations of more than one DOT agency, the railroad shall determine which DOT agency regulation or rule authorizes or requires the test. The test result information shall be directed to the appropriate DOT agency or agencies.

(c) Each railroad shall ensure the accuracy and timeliness of each report submitted by the railroad or a consortium.

(d) Each railroad shall submit the required annual reports no later than February 15 of each year. The report shall be submitted on the form specified by the FRA. Each report shall contain:

(1) Number of covered employees by employee category (i.e., train service, engine service, dispatcher/operator, signal, covered supervisory, other).

(2) Number of covered employees in each category subject to alcohol testing under the alcohol misuse regulation of another DOT agency, identified by each agency.

(3)(i) Number of initial tests by type of test (i.e., pre-employment and "covered service," random, post-positive return to duty, etc.), type of authority (FRA, or, for accident/incident and rule violation cause testing, railroad) and employee category.

(ii) Number of confirmatory tests, by type of test and employee category.

(4) Number of confirmatory alcohol tests indicating an alcohol concentration of .04 or greater, by type of test and employee category.

(5) Number of confirmatory alcohol tests indicating an alcohol concentration of .02 or greater but less than .04, by type of test and employee category.

(6) Number of persons denied a position as a covered employee following a pre-employment/pre-duty alcohol test indicating an alcohol concentration of .04 or greater.

(7) Number of covered employees with a confirmatory alcohol test indicating an alcohol concentration of .04 or greater who were returned to service in covered positions (having complied with the recommendations of a substance abuse professional as described in § 219.104(d).

(8) Number of covered employees who were administered alcohol and drug tests at the same time, with both a positive drug test result and an alcohol test result indicating an alcohol concentration of .04 or greater.

(9) Number of covered employees who were found to violate other provisions of subpart B of this part, and the action taken in response to the violation.

(10) Number of covered employees who refused to submit to an alcohol test required under this part, and the action taken in response to the refusal.

(11) Number of covered employees and supervisors who have received training during the reporting period in determining the existence of reasonable suspicion of alcohol misuse.

(e) Annual reporting for calendar year 1992 and prior years shall be governed by the provisions of § 217.13 of this chapter in effect during the subject calendar period.

39. Part 219 is amended by adding subpart J as follows:

Subpart J—Recordkeeping Requirements

§ 219.901 Retention of breath alcohol testing records.

(a) *General requirement.* Each railroad shall maintain records of its alcohol misuse prevention program as provided in this section. The records shall be maintained in a secure location with controlled access.

(b) *Period of retention.* Each railroad shall maintain the records in accordance with the following schedule:

(1) *Five years.* Records of employee alcohol test results with results indicating an alcohol concentration of .02 or greater, documentation of refusals to take required alcohol tests, calibration documentation, and employee evaluation and referrals shall be maintained for a minimum of five years.

(2) *Two years.* Records related to the collection process (except calibration of evidential breath testing devices) and training shall be maintained for a minimum of two years.

(3) *One year.* Records of negative test results (as defined in part 40 of this title) shall be maintained for a minimum of one year.

(c) *Types of records.* The following specific records must be maintained.

(1) Records related to the collection process:

(i) Collection logbooks, if used.

(ii) Documents relating to the random selection process.

(iii) Calibration documentation for evidential breath testing devices.

(iv) Verification of breath alcohol technician training.

(v) Documents generated in connection with decisions to administer reasonable suspicion alcohol tests.

(vi) Documents generated in connection with decisions on post-accident testing.

(vii) Consolidated annual reports to FRA.

(viii) Documents verifying the existence of a medical explanation of the inability of a covered employee to provide an adequate breath sample.

(2) Records related to test results:

(i) The railroad's copy of the alcohol test form, including the results of the test.

(ii) Documents related to the refusal of any covered employee to submit to an alcohol test required by this part.

(iii) Documents presented by a covered employee to dispute the result of an alcohol test administered under this part.

(3) Records related to other violations of this part.

(4) Records related to evaluations:

(i) Records pertaining to a determination by a substance abuse professional concerning a covered employee's need for assistance.

(ii) Records concerning a covered employee's compliance with the recommendations of the substance abuse professional.

(5) Records related to evaluation and training:

(i) Materials on alcohol misuse awareness, including a copy of the railroad's policy on alcohol misuse.

(ii) Documentation of compliance with the requirements of § 219.23.

(iii) Documentation of training provided to supervisors for the purpose of qualifying the supervisors to make a determination concerning the need for alcohol testing based on reasonable suspicion.

(iv) Certification that any training conducted under this part complies with the requirements for such training.

§ 219.903 Retention of urine drug testing records.

(a) *General requirement.* Each railroad shall maintain records of its drug misuse prevention program as provided in this section. The records shall be maintained in a secure location with controlled access.

(b) *Period of retention.* Each railroad shall maintain the records in accordance with the following schedule:

(1) *Five years.* Records of employee positive drug test results, documentation of refusals to take required drug tests, and employee evaluation and referral shall be maintained for a minimum of five years.

(2) *Two years.* Records related to the collection process and training shall be maintained for a minimum of two years.

(3) *One year.* Records of negative test results (as defined in part 40 of this title) shall be maintained for a minimum of one year.

(c) *Types of records.* The following specific records must be maintained.

(1) Records related to the collection process:

(i) Collection logbooks, if used.

(ii) Documents relating to the random selection process.

(iii) Documents generated in connection with decisions to administer reasonable suspicion drug tests.

(iv) Documents generated in connection with decisions on post-accident testing.

(v) Consolidated annual reports to FRA.

(vi) Documents verifying the existence of a medical explanation of the inability of a covered employee to provide a urine sample.

(2) Records related to test results:

(i) The railroad's copy of the drug test custody and control form, including the results of the test.

(ii) Documents related to the refusal of any covered employee to submit to a drug test required by this part.

(iii) Documents presented by a covered employee to dispute the result of a drug test administered under this part.

(3) Records related to other violations of this part.

(4) Records related to evaluations:

(i) Records pertaining to a determination by a substance abuse professional concerning a covered employee's need for assistance.

(ii) Records concerning a covered employee's compliance with the recommendations of the substance abuse professional.

(5) Records related to evaluation and training:

(i) Materials on drug misuse awareness, including a copy of the railroad's policy on drug misuse.

(ii) Documentation of compliance with the requirements of § 219.23.

(iii) Documentation of training provided to supervisors for the purpose of qualifying the supervisors to make a determination concerning the need for drug testing based on reasonable suspicion.

(iv) Certification that any training conducted under this part complies with the requirements for such training.

§ 219.905 Access to facilities and records.

(a) Except as required by law or expressly authorized or required in this section, no railroad shall release covered employee information that is contained in records required to be maintained under §§ 219.901 and 219.903.

(b) A covered employee is entitled, upon written request, to obtain copies of any records pertaining to the employee's use of alcohol or drugs, including any records pertaining to his or her alcohol or drug tests. The railroad shall promptly provide the records requested by the employee. Access to an employee's records shall not be contingent upon payment for records other than those specifically requested.

(c) Each railroad shall permit access to all facilities utilized in complying with the requirements of this part to the Secretary of Transportation or any DOT agency with regulatory authority over

the railroad or any of its covered employees.

(d) Each railroad shall make available copies of all results for railroad alcohol and drug testing programs conducted under this part and any other information pertaining to the railroad's alcohol and drug misuse prevention program, when requested by the Secretary of Transportation or any DOT agency with regulatory authority over the railroad or covered employee.

(e) Records shall be made available to a subsequent railroad upon receipt of written request from the covered employee. Disclosure by the subsequent railroad is permitted only as expressly authorized by the terms of the employee's request.

(f) A railroad may disclose information required to be maintained under this part pertaining to a covered employee or the decisionmaker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the individual, and arising from the results of an alcohol or drug test administered under this part, or from the railroad's determination that the employee engaged in conduct prohibited by subpart B of this part (including, but not limited to, a Federal Employers' Liability Act, worker's compensation, unemployment compensation, or other proceeding relating to a benefit sought by the employee).

(g) A railroad shall release information regarding a covered employee's records as directed by the specific, written consent of the employee authorizing release of the information to an identified person. Release of such information by the person receiving the information is permitted only in accordance with the terms of the employee's consent.

40. Part 219 is amended by adding appendix E, as follows:

Appendix E to Part 219—Outline of FRA Regulation on Control of Alcohol and Drug Use

Modal	FRA
General	
Purpose	§219.1
Applicability	§219.3
Alcohol testing procedures.	§219.715(b)
Definitions	§219.5
Preemption	§219.13
Other requirements imposed by employers.	§§219.1(b), 219.11(g), 219.101(c), 219.104(c)(4),(c)(5), 219.301(b)(4), 219.401(e)(3), 219.403(a), 219.405(a)
Requirement for notice.	§§219.23(a),(b),(c), 219.503, 219.607(b)(7), 219.607(d)(1)
Starting date for alcohol testing programs.	§§219.5, 219.607(d)(2)
Prohibitions	
Alcohol concentration.	§§219.101(a), 219.105
Behavior and appearance.	§§219.101(a), 219.105
On-duty use	§§219.101(a), 219.105
Pre-duty use	§§219.101(a)(3), 219.105
Use following an accident.	§§219.203(b)(4), 219.213(a)
Refusal to submit to a required alcohol test.	§§219.104(d), 219.107, 219.213(a)(1), 219.300(c), 219.603(a), (b)(1), 219.609(a), (b)(1)
Tests required	
Pre-employment/pre-duty testing.	§§219.501(a),(e), 219.505
Post-accident testing	§§219.11(b)(2), 201(c)(2), 219.203(a)(1), (a)(2), (a)(3), (b)(2), (b)(3) 219.209(b)
Random testing	§§219.601(b)(1),(b)(2), 219.607(b)(1), (b)(2), (b)(6), 219.715(a)
Reasonable suspicion testing.	§§219.300(a)(1),(b), (d)(2), 219.302(a),(b) §§219.11(a),(b)(1), 219.301(a)
Return-to-service testing.	§219.104(d)(3)
Follow-up testing	§219.104(d)(3)
Retesting of covered employees with an alcohol concentration of .02 or greater but less than .04.	§219.104(f)
Handling of test results, record retention, and confidentiality	
Retention of records	§219.903
Reporting of results in a management information system.	§§219.801, 219.803
Access to facilities and records.	§§219.211(e), 219.905
Consequences for employees engaging in alcohol-related conduct	
Removal from a safety-sensitive function, required evaluation and testing.	§§219.11(b)(2), 219.101, 219.104(a), 219.105(a),(b), 219.107, 210.203(b)(2),(b)(3)
Other alcohol-related conduct.	§§219.1(b), 219.11(b)(2), 219.104(f), 219.203(b)(2),(b)(3)
Alcohol misuse information, training and referral	
Employer obligation to promulgate a policy on alcohol.	§219.23(e),(f),(g)
Training for supervisors.	§219.11(g)
Referral, evaluation, and treatment.	§§219.1(b), 219.11(g), 219.23(d), 219.104(a), (d)

Issued in Washington, DC, on December 2, 1992.

Andrew H. Card, Jr.

Secretary.

Gilbert E. Carmichael,

Administrator, Federal Railroad Administration.

[FR Doc. 92–29682 Filed 12–10–92; 10:00 am]

BILLING CODE 4910–06–M

Federal Railroad Administration

49 CFR Part 219

[Docket No. RSOR–6; Notice No. 33]

RIN 2130–AA43

International Application: Alcohol/Drug Regulations

AGENCY: Federal Railroad Administration (FRA), DOT.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: Foreign railroads operating within the United States have been subject to regulations issued by the Federal Railroad Administration (FRA) on the control of alcohol and drug use since February 10, 1986. The Omnibus Transportation Employee Testing Act of 1991 ("Act"), however, requires FRA to amend its existing regulations by (among other changes) incorporating new procedures and safeguards with respect to breath and body fluid testing for alcohol, and mandating reasonable suspicion testing for both alcohol and drugs. In this advance notice of proposed rulemaking (ANPRM), FRA seeks comment on issues arising from the international application of the new statutory requirements.

DATES: Written comments must be received by February 16, 1993. Late filed comments will be considered to the extent practicable.

ADDRESSES: Comments shall be filed in triplicate with the Docket Clerk, Docket No. RSOR–6, Office of the Chief Counsel, Federal Railroad Administration, 400 7th Street, SW., room 8201, Washington, DC, 20590. Parties wishing the FRA to acknowledge receipt of their comments should submit with those comments a pre-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. RSOR–6." The postcard will be dated and time stamped and returned to the commenter. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by

interested persons, between 8:30 a.m. and 5 p.m. Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Walter C. Rockey, Executive Assistant to the Associate Administrator for Safety (RRS–3), Office of Safety, FRA, Washington, DC 20590 (Telephone: (202) 366–0897) or Patricia V. Sun, Trial Attorney (RCC–30), Office of Chief Counsel, FRA, Washington, DC 20590 (Telephone: (202) 366–4002).

SUPPLEMENTARY INFORMATION: Foreign railroads operating within the United States have been subject to regulations issued by the Federal Railroad Administration (FRA) on the control of alcohol and drug use (49 CFR part 219) since February 10, 1986. However, FRA has always determined that its random drug testing requirements do not apply in any situation where compliance would violate the domestic laws or policies of another country. FRA recently published a second final rule delaying application of random drug testing (subpart G) to railroad personnel based outside the United States until January 2, 1995, to allow for negotiations with foreign governments.

Covered service employees whose place of reporting or point of departure ("home terminal") for rail transportation services is located outside the United States have therefore not been subject to random drug testing, although such employees have always been subject to FRA's prohibitions on job-related use or possession of alcohol or drugs, reasonable cause testing, and post-accident testing (subparts B (except for return to service testing), C, and D) when operating in U.S. territory. Employee assistance policies (subpart E), pre-employment testing (subpart F), and return to service testing, like random testing, have remained subject to the law of where the employee is based (as determined by the employee's home terminal or reporting point). U.S. based crews have, of course, been subject to all components of FRA's program.

FRA's current approach is consistent with our prior discussions with Transport Canada. (As applied, FRA's regulations have affected only Canadian employees, since Mexican employees do not operate in U.S. territory.) With the enactment of the Omnibus Transportation Employee Testing Act of 1991, however, FRA now reexamines its testing program to determine how the Act's mandates will affect foreign employers. A discussion of departmental issues follows. FRA also invites commenters to raise mode-specific issues.

The Department's Legal Authority for Foreign Employer Testing Programs

The Omnibus Transportation Employee Testing Act of 1991, Public Law No. 102–143, provides for coverage by the Department's drug and alcohol testing rules of activities in the U.S. of foreign employers. The relevant provisions of the Act for the aviation industry provides that FAA regulations shall establish a program which requires air carriers *and foreign air carriers* to conduct preemployment, reasonable suspicion, random, and post accident testing for use, in violation of law or Federal regulation, of alcohol or a controlled substance. [Sec. 3 of the Act, amending § 614(a)(1) of the Federal Aviation Act (emphasis added).] In prescribing regulations under this section, the FAA Administrator shall only establish requirements applicable to foreign air carriers that are consistent with the international obligations of the United States, and the Administrator shall take into consideration any applicable laws and regulations of foreign countries. [Sec. 3 of the Act, amending § 614(e)(3) of the Federal Aviation Act.]

The portion of the Act affecting the railroad industry provides that FRA regulations shall establish a program which requires *railroads* to conduct preemployment, reasonable suspicion, random, and post-accident testing of all railroad employees responsible for safety sensitive functions for use, in violation of law or Federal regulation, of alcohol or a controlled substance. [Sec. 4 of the Act, amending § 202(r)(1) of the Federal Railroad Safety Act of 1970 (emphasis added).] In carrying out the provisions of this subsection, the Secretary shall only establish requirements that are consistent with the international obligations of the United States, and the Secretary shall take into consideration any applicable laws and regulations of foreign countries. [Sec. 4 of the Act, amending § 202(r)(1) of the Federal Railroad Safety Act of 1970.]

The portion of the Act affecting the motor carrier industry provides that FHWA regulations shall establish a program which requires *motor carriers* to conduct preemployment, reasonable suspicion, random, and post-accident testing of the operators of commercial motor vehicles for use, in violation of law of Federal regulation, of alcohol or a controlled substance. [Sec. 5(a)(1) of the Act, creating § 12020(a) of the Commercial Motor Vehicle Safety Act of 1986 (emphasis added).] In issuing regulations under this section, the Secretary shall only establish requirements that are consistent with the international obligations of the United States, and the Secretary shall take into consideration any applicable laws and regulations of foreign countries. Sec. 5(a)(1) of the Act, creating Section 12020(e)(3) of the Commercial Motor Vehicle Safety Act of 1986.

There are no similar provisions applicable to the transit industry, since the Federal Transit Administration drug and alcohol testing provisions do not cover foreign employers.

Under these similar provisions, FAA, FRA and FHWA have the authority and obligation to require drug and alcohol tests for safety sensitive employees of foreign employers. The FAA provisions specifically extend coverage to foreign air carriers, and the FHWA and FRA provisions cover motor carriers and railroads, respectively, which definitions include employers based in this country or in a foreign country. Moreover, the legal authority extends to all kinds of testing required by the Act: Reasonable suspicion, post-accident, preemployment, and random (subject to U.S. international obligations).

It is the Department's policy to carry out the Act's requirements using a territorial jurisdiction approach. That is, the Department interprets its statutory authority and obligation for drug and alcohol testing to apply to foreign employers who conduct operations in the United States, with respect to those operations. This does not mean that all operations of such a transportation employer would be subject to the rules. For example, a foreign employer's operations within its own country would not be subject to these rules. Following the same policy, only those employees of a foreign transportation employer who perform safety-sensitive functions in operations within the U.S. would be subject to testing.

For each of the three industries involved, the Act requires the Department to act consistent with the international obligations of the U.S., and to take foreign countries' laws and regulations into account. (This could be relevant, for example, to the conduct of testing in some foreign countries.) The Department is sensitive to the concerns of foreign countries. We are also very much aware of a number of practical considerations that may arise as we implement the Act with respect to foreign employers. For these reasons, as well as to foster consistency in the implementation of very similar statutory provisions, the FRA, FHWA, and FAA are issuing advance notices of proposed rulemaking rather than notices of proposed rulemaking (NPRMs). We are

seeking the public's views on a variety of issues and questions that may arise with respect to drug and alcohol testing by foreign employers.

General Problems and Issues

The following problems, questions, and issues appear to arise in the aviation, railroad, and motor carrier contexts. In responding to these questions and requests for comment, we ask that commenters distinguish responses relating to alcohol testing from those relating to drug testing, where the same response is not appropriate for both. In addition to these general issues, we also seek comment on any FRA-specific issues, or FRA-specific variations on these issues. We request that all responses, on both general and FRA-specific issues, be sent to the docket for this ANPRM.

1. International Treaties and Foreign Laws

We seek information on any bilateral or multilateral treaty obligations of the U.S., or principles of international law, that may affect our implementation of the Act. If there are any international agreements under development that would affect drug and alcohol testing of foreign employers, we also seek information on them. In commenting on international obligations of the U.S., we request that commenters focus on any provisions that affect the ability of the United States to test employees conducting operations in the U.S., with the testing to take place in the U.S.

In addition to international obligations, we seek comment on any laws or regulations of foreign countries that we should take into account in implementing the Act. We would like to obtain information on any laws or rules of specific foreign countries whose employers conduct U.S. operations that we should consider.

2. Pre-Employment and Follow-Up Testing

Often, employees of foreign transportation employers are recruited and hired in the foreign country involved. For example, a Canadian employer may hire Canadian nationals in Canada, some of whom will subsequently conduct operations in the U.S. The employer may not know, at the time of hire, which of its employees will operate in the U.S. In such a situation, should the employer be required to conduct pre-employment testing? If so, how, when and where would the foreign employer conduct pre-employment testing of the employees who were to operate in the U.S.?

Should all pre-employment testing be conducted in the U.S., or should the rules permit the employer to conduct tests in its own country? Where the employer could not, because of legal restraints on testing in its own country, conduct testing there, could the testing be arranged in the United States? For example, should the employer send the employee to a point in the United States for a test before the employee actually conducts an operation in this country? Should pre-employment testing be required at all in such a situation?

If an employee tests positive on any type of alcohol or drug test, FRA's existing and proposed rules require a return- to-service test and follow-up tests, over a period of time. For an employee whose home terminal or reporting point is in a foreign country, and who comes into the U.S. occasionally, questions similar to those mentioned above for pre-employment testing may arise. If the employer does not conduct the tests in its own country, how does the employer arrange for the required tests to take place in the U.S.?

3. Random Testing

Should all of a foreign employer's covered employees who operate in the U.S. at any time have to be part of the random testing pool? How would foreign employers arrange for the unannounced, random testing of their employees in U.S. territory? In their own countries? Also, to meet random testing rate requirements, employers have to conduct a certain number of tests per year (e.g., under a 50 percent random testing rate, a number of tests each year equivalent to half the number of the employees in the random pool). Would it be practical for employers to meet this requirement, while maintaining randomness, if tests are conducted only in the U.S.? Are there circumstances in which foreign employers should not be subject to a random testing requirement?

4. Requirement for All Types of Tests

Should the Department refrain from requiring foreign employers to conduct certain kinds of tests? The Department anticipates little problem with requiring a post-accident or reasonable suspicion test in the U.S., following an accident or basis for reasonable suspicion that occurred in this country (FRA currently requires this). However, as discussed above, there may be greater problems with other forms of testing. Is it desirable to exclude foreign employers from some or all types of alcohol or drug testing? Why or why not? Should the legal authority of the employer to conduct a certain kind of testing in its own country be considered in deciding whether to exclude employers in a certain country from a requirement? If some exclusions are desirable, how can this objective be reconciled with the testing requirements of the Act?

5. Other Compliance Activities

DOT drug and alcohol rules have a variety of other program requirements in addition to testing. These requirements pertain to employee assistance and training programs, substance abuse professionals, record retention and reporting, and many other subjects. Some of these activities or functions might well take place most conveniently in the foreign employer's country. Should some or all of the foreign employer's program activities be required or permitted to take place outside the U.S.? How would the Department monitor or enforce compliance with drug or alcohol program activities that take place outside the U.S.? How and where would Departmental personnel obtain access to information about the employers' implementation of program and testing requirements?

6. Testing Procedures

49 CFR part 40 governs testing under the DOT drug and alcohol testing rules of the three operating administrations involved (except for FRA post-accident testing). Part 40 compliance could raise a number of problems if any testing or collection is performed abroad. Some of these issues may apply even with respect to testing by foreign employers that occurs in the U.S. Some examples follow.

Drug testing under part 40 includes testing specimens at NIDA-certified laboratories, all of which are in the U.S. If specimen collection for drug testing is done outside the U.S., specimens would probably be sent to these laboratories for analysis. What practical problems does this create (*e.g.*, timeliness of transmission of specimens and associated paperwork), and how could they be solved? If drug specimen collection or alcohol testing is permitted to be conducted outside the U.S., what language or training problems would need to be overcome, and what is the best way of dealing with these problems (e.g., translations of DOT requirements or forms)? In drug testing, there is a requirement for medical review officers (MROs) to verify positive tests and perform other functions. Should MROs (who, under current rules, must be physicians licensed in the U.S.) have to perform these functions, or should physicians licensed in the foreign countries involved be able to participate

as well? The same question can be asked for substance abuse professionals who would evaluate people who test positive for alcohol and drugs. If personnel licensed in the U.S. were required for this function, would this create difficult logistical problems for the program? Would there be problems in obtaining or using evidential breath testers on the National Highway Traffic Safety Administration's Conforming Products List (which part 40 requires for alcohol testing) in other countries, if testing is permitted to be conducted outside the U.S.?

The Department seeks comment on any other part 40-related problems that may occur in the context of testing of foreign operators. Should there be a method of accepting a foreign country's testing procedures in lieu of some or all part 40 procedures, if testing is permitted to be conducted in foreign countries?

7. Consequences of Positive Tests

The consequence of a "positive" test is removal from a safety-sensitive position, until the employee follows the rule's procedures for reinstatement in the safety sensitive position. However, the application of the DOT drug and alcohol testing rules to foreign employers is intended only to affect U.S. operations. Consequently, the Department would not assert jurisdiction to require that an employee of a foreign employer who tested positive not perform safety-sensitive functions in operations outside the U.S. However, such an employee would be prohibited from conducting any safety-sensitive functions in the U.S., until the employee follows the rule's procedures for reinstatement in the safety sensitive position. How would foreign employers make sure that an employee who tested positive did not engage in operations in the U.S., until reinstatement requirements had been met? How would the Department monitor compliance with this requirement?

8. Costs

What is the number of employees who would be affected by a requirement to test persons performing safety-sensitive functions in the U.S. for foreign employers? Do commenters anticipate that foreign operators' positive test rates (which can affect costs significantly) be higher, lower, or about the same as the positive test rates of U.S. employers for the employees who would be subject to these rules? Are there costs unique to drug and alcohol program activities that may occur outside the U.S. that the Department should consider in estimating the costs of the rule? Are there any positive or negative trade or competitive effects of testing (or not testing) employees of foreign employers, for either U.S. or foreign companies?

Executive Order 12291 and DOT Regulatory Policy and Procedures

This anticipated rulemaking is not "major" under Executive Order 12291. It is significant under the Department of Transportation's Regulatory Policy and Procedures.

Other Regulatory Matters

At this preliminary stage, it is not yet possible to determine whether there will be a significant economic impact on a number of small entities, what the paperwork burden might be, or whether there will be any federalism implications. Each of these regulatory matters will be addressed fully at the time of publication of any notice of proposed rulemaking on this subject.

Paperwork Reduction Act

FRA has not yet determined whether this anticipated rule will contain a collection of information requirement for purposes of the Paperwork Reduction Act (Pub. L. 96–511).

List of Subjects in 49 CFR Part 219

Railroad safety, Control of alcohol and drug use.

Issued in Washington, DC., on December 2, 1992.

Andrew H. Card, Jr.,
Secretary.
Gilbert E. Carmichael,
Administrator,
Federal Railroad Administration

[FR Doc. 92–29683 Filed 12–10–92; 10:00 am]
BILLING CODE 4910–06–M

Federal Railroad Administration

49 CFR Parts 217 and 219

[Docket No. RSOR–6; Notice No. 35]

RIN 2130–AA64

Annual Reporting Requirements; Amendments to Alcohol/Drug Regulations

AGENCY: Federal Railroad Administration (FRA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: FRA proposes to amend and expand its current annual reporting requirements for data concerning control of alcohol and drug misuse in railroad operations. The proposed standard format for reporting is designed to elicit data in a manner compatible with related reporting requirements that would be embodied in the alcohol and drug misuse prevention programs applicable to other transportation industries. This action is necessary to provide comparable data for inclusion in a management information system designed to determine the effectiveness of such programs.

DATES: (1) Any request to make an oral presentation must be received by January 4, 1993.

(2) Written comments must be received by April 14, 1993. Late filed comments will be considered to the extent practicable.

(3) FRA proposes to make the final rule effective immediately on publication in the Federal Register.

ADDRESSES: Comments shall be sent to Docket Clerk, Docket No. RSOR–6, Office of the Chief Counsel, Federal Railroad Administration, 400 7th Street, S.W., Room 8201, Washington, D.C., 20590. Persons wishing the FRA to acknowledge receipt of their comments should submit with those comments a pre-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. RSOR–6." The postcard will be dated and time stamped and returned to the commenter. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons, between 8:30 a.m. and 5 p.m. Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Don Shatinsky, Alcohol and Drug Program Manager (RRS–11), Office of Safety, FRA, Washington, DC 20590 (Telephone: (202) 366–0127) or Patricia V. Sun, Trial Attorney (RCC–30), Office of Chief Counsel, FRA, Washington, DC 20590 (Telephone: (202) 366–4002).

SUPPLEMENTARY INFORMATION:

Background

On November 21, 1988 (53 FR 47103), FRA published a final rule containing amendments to its alcohol and drug regulations, which were first promulgated on August 2, 1985. These amendments established a random drug testing program and added new safeguards for urine drug testing, incorporating procedures from a Department of Transportation regulation, "Procedures for Transportation Workplace Drug Testing Programs" (49 CFR part 40), that had instituted standards for drug testing of transportation employees. FRA published additional amendments to its alcohol and drug regulations on December 27, 1989 (54 FR 53238) and June 4, 1990 (55 FR 22791). The December 27, 1989 republication

significantly revised the alcohol/drug reporting requirements contained in 49 CFR 217.13(d) and provided the structure for 1990 and subsequent annual reports due before March 1 each year.

On November 27, 1989, the General Accounting Office (GAO) published a report on the status of the programs promulgated by the DOT regulations. A primary recommendation in the GAO report was that "[t]he Secretary of Transportation adopt evaluation criteria and provide the administrations with guidance on the types of program information they should be getting from employers to evaluate program success."

OST/FRA Proposal

The Office of Drug Enforcement and Program Compliance in the Office of the Secretary, DOT (hereinafter "OST"), therefore developed a comprehensive plan for a management information system (MIS) to obtain and analyze employer alcohol and drug program data. OST has identified standard data elements critical to the review and management of the operating administrations' alcohol and drug programs and is proposing, elsewhere in today's **Federal Register**, to amend its Procedures for Transportation Workplace Drug Testing (49 CFR part 40).

Employers who fall under two or more DOT Agency regulations requiring alcohol and drug testing, must submit data to each regulating operating administration (OA) for those employees covered by that OA's rule. Employees who perform functions covered by more than one OA should be identified by their employer as to which covered position they will be reported under. Alcohol and drug program data on dual covered employees should be reported to the appropriate OA. Generally, pre-employment, random, and return to duty tests should be reported to the OA that regulates the function used as the basis for employee category. Post-accident tests should be reported to the OA to whom that accident is reportable. Testing for cause should be reported to the OA based on the employee function requiring the test.

In order to elicit data that is useful for intermodal analysis, FRA proposes to repeal its existing reporting requirements (§ 217.13(d)) and substitute a MIS that includes both generic DOT elements and mode-specific refinements, reflecting industry practice and FRA and railroad programs already in place. Analysis of this data would provide an important means for monitoring implementation, compliance and enforcement, and for evaluating the effectiveness of the alcohol and drug program. (Also in today's **Federal Register**, FRA is separately proposing an analogous MIS to collect employer alcohol program data as part of a Notice of Proposed Rulemaking (NPRM) amending its alcohol and drug regulations in response to the Omnibus Transportation Employee Testing Act of 1991 ("Omnibus Act").)

A new subpart of part 219, subpart I, Reporting and Review of Results, would require railroads to submit MIS reports for each calendar year by February 15 of the following year. Subpart I would have the same applicability as subparts D, E, F and G; that is, all railroads not excluded under the small railroad exclusion in § 219.3 would be required to file annual alcohol/drug program reports.

As noted above, the proposed data collection form would incorporate format and data elements from the OST form, but with substantive changes unique to FRA. The preamble to OST's parallel NPRM contains comments, discussions and questions that should be considered when reviewing the proposals in FRA's NPRM. Commenters should therefore indicate whether they are responding to the departmental NPRM or the FRA NPRM. Persons filing comments on the OST proposal who wish to have those comments considered in this proceeding must provide copies of their filing to the FRA Docket Clerk at the address set forth above.

Adaptation of the OST MIS Format

OST and FRA recognize that FRA's regulatory provisions are not precisely parallel to those of the other modal administrations. In some cases, requirements are substantially the same, but carry different names; in others, common names tend to mask significant differences. Therefore, FRA has worked with OST to reconcile the various facets of the data collection instrument with the specific regulatory and industry context. The result is a form that should successfully elicit the data required for the OST MIS while using language more familiar to railroad reporting officers and better corresponding to the reality of railroad programs.

FRA's proposed MIS data elements include many required to be addressed in current FRA regulations (49 CFR 217.13(d)). However, the MIS elements are not coextensive with the current FRA requirements. Even where the data elements generally correspond, they are often not identical. Further, due to differences among industries and regulatory programs, the MIS elements do not include several sets of data that remain of importance with respect to the railroad industry.

The OST notice published elsewhere in today's **Federal Register** discusses the proposed standard requirements. The following discussion addresses some of the more prominent adaptations and additions proposed for the form that would be utilized by the railroads.

For each of the MIS data charts, FRA has entered standard rail employee categories (engine service, train service, dispatcher/train order operator, signal service, and other Hours of Service employees). Comment is solicited as to whether these categories adequately define the primary functional groups for which comparative analysis may be useful.

There are two data charts contained in the Part 40 form that do not appear in the FRA form:

First, there is no chart labeled "post-accident tests." Mandatory post-accident toxicological testing ("PATT"), as conducted by FRA, is designed to support accident investigations and to shed light on the role of alcohol, as well as other drugs. FRA requires railroads to obtain blood and urine samples after qualifying accidents and incidents, generally without regard to any threshold showing that the employee contributed to the accident/incident. Samples are then forwarded to an FRA contract laboratory, which analyzes them for alcohol and controlled substances that FRA has specified for the particular accident investigation. As all PATT testing is conducted by FRA's designated laboratory, and FRA maintains these test records, FRA finds it unnecessary to include questions about PATT results.

Second, there is no chart for periodic tests, since FRA does not require this form of testing.

In addition to these omissions, FRA proposes to adapt or supplement the OST format in the following respects:

In item D., "pre-employment tests," FRA has modified the caption to indicate that both pre-employment tests and first- time transfers from non-covered to covered service should be included.

In item E., following the chart for "random testing," FRA has inserted data elements derived from the current part 217 reporting requirements. These data elements are designed to follow the progress of employees identified as having violated the prohibitions on alcohol and drug use (§§ 219.101 and 219.102), with respect to discipline, evaluation, treatment, return to service and any later relapse.

The reporting format for "reasonable cause testing" data has been significantly altered. FRA has changed the caption to "testing for cause," to conform with the new subpart D heading published elsewhere today in FRA's Omnibus Act NPRM. FRA would change the title of subpart D from "Authorization to Test for Cause" to "Testing for Cause" to emphasize that reasonable suspicion testing is no longer discretionary. Under the Omnibus Act, reasonable suspicion testing for alcohol and controlled substances changes from an authorized option to a mandatory program. The accident/incident and rule violation components of FRA's for cause testing program would remain optional for both alcohol and drug testing.

The proposed OST (part 40) chart for "reasonable cause testing" would obviously not produce railroad data that would be comparable with other modes, since the FRA "testing for cause" provisions (49 CFR part 219, subpart D) are much more expansive than the reasonable cause provisions of other modal rules. Although testing for reasonable suspicion of current use or impairment (the sole basis for "testing for cause" of employees in other modes), will now be mandatory as required by the Omnibus Act, the FRA rule also authorizes testing following certain lesser-magnitude accidents and casualties and following enumerated rule violations.

"Reasonable cause testing," in other modes, is comparable to the reasonable suspicion component of FRA's testing for cause program, which requires testing where a supervisory employee has a reasonable suspicion that an employee is impaired or under the influence, based on specific, articulable observations about that employee. Data from these queries will be utilized for the intermodal "reasonable cause" analysis. The accident/incident component of FRA's testing for cause program is the portion actually analogous to "post-accident" testing as conducted by other modes. Supervisory employees are authorized to conduct testing where they have a reasonable suspicion that an employee's acts or omissions contributed to the cause or severity of a reportable accident. Data from these queries will be utilized for the intermodal "post-accident" analysis.

The third component of FRA's testing for cause program, the operating/safety rule component, authorizes testing when an employee has committed any of the specified operating rule violations. This type of testing for cause is unique to the FRA program.

FRA seeks information on all three types of testing for cause, and accordingly has included in section E of the form a separate chart for each testing for cause component. For the accident/incident and operating/safety rule components, each railroad may elect whether to test under the FRA rule (subpart D) or its own authority, and there are significant differences in the substances, testing assays, cutoffs, etc., between FRA-authorized testing using part 40 procedures and private activity. Although it might seem logical to ignore non-DOT/FRA testing for this purpose, that would result in the loss of data on the majority of railroad for-cause tests. Since these tests are both numerous and useful with respect to addressing the alcohol and drug misuse problem, FRA proposes to carry forward existing reporting requirements for this information. However, because of the technical differences that obtain, including testing for "other drugs," the reporting blocks have been modified to permit the reporting railroad to check off the type of authority under which it tested. In the rare case of a railroad using both FRA authority and the company program, the company would complete two copies of the pertinent charts to report testing for cause results from the FRA and railroad testing program. Section E also contains separate questions that request specific information on tests conducted under a railroad's own rules or collective bargaining agreements.

Following the three "testing for cause" charts, FRA proposes to add information from the existing reporting requirements concerning for-cause breath alcohol and urine alcohol testing. Like drug urinalysis, breath alcohol testing may be conducted as testing for cause under subpart D of the FRA regulation or otherwise "for cause" under a railroad's own program. Urine alcohol testing is not presently authorized under the FRA regulation (and is not included in the NPRM that FRA is publishing today proposing amendments in response to the Omnibus Act) due to the technical difficulties with this type of specimen and the apparent lack of interest in utilizing FRA authority for this purpose. However, properly conducted urine alcohol testing can add further capacity to detect and remedy alcohol safety problems. FRA thus proposes to continue to collect this information, as well.

FRA has denominated the OST chart "Return to Duty Testing" as "Post Positive Return to Service Testing" in order to emphasize that it only requests information on return-to-service tests that are required by § 219.104 of the FRA rule. It does not request information on the rather extensive testing undertaken by the railroads on employees returning to service following personal injuries, furloughs, and other periods out of service. Although this other testing is useful, it is generally undertaken with advance notice (for which a low positive rate would be expected) and is not required by the FRA rule.

The OST model chart on "test refusals" has also been modified to delineate the three forms of reasonable suspicion testing.

Finally, FRA has included a chart to collect information on follow-up urine drug testing for those employees who were returned to service after having tested positive in a federal random or for-cause test.

Section by Section Analysis

FRA proposes to add a new subpart I, addressing Annual Reporting Requirements, to part 219. Subpart I would provide data for the OST MIS and incorporate in a more useful format much of the data that FRA already requires. Section 219.3 of the existing regulations would be amended to add subpart I to the list of subparts (D, E, F and G) that do not apply to certain small railroads.

Approximately 60 railroads with 400,000 or more total manhours are currently required to submit annual operating rules and practices reports, including alcohol and drug program data, by March 1 of each following year. The new reporting requirements would expand the universe of reporting railroads to include all of those railroads (operating entities) that were required to file random drug testing programs for FRA approval (about 175 total). However, the smallest railroads, already excused from filing random testing plans, (those with fewer than 15 employees in covered service that do not operate on the tracks of another railroad or engage in joint operations) would likewise be excused under the new filing requirements.

Subpart I would require submission of annual reports to FRA providing the information required by the form and instructions set out in a new appendix D, which is reproduced below. Each report under the proposed subpart I would cover a calendar year. The closing date would be December 31 and the report would be due at FRA by February 15 of the following year. Comment is specifically requested on the feasibility of this 45 day interval for reporting the annual data.

As adapted for the railroad industry, the report must cover each of the following data elements:

1. Number of covered employees by employee category (ie., train service, engine service, dispatcher/operator, signal service, other). This data is necessary to assess the scope of the rule's application and provide a basis for determining if random testing meets the required annual testing percentage.

2. Number of covered employees in each category subject to testing under the anti-drug rules of more than one DOT agency, identified by each agency. This data is necessary to review multi-modal implementation so that policy can be designed accordingly.

3. Number of specimens collected by type of test (e.g., pre-employment/transfer, random, post-positive return to duty, etc.), type of authority (FRA, or, for accident/incident and operating/safety rule testing for cause, railroad) and employee category. This data is needed to check the compliance with the rules by category and to review collection, testing and the review process.

4. Number of positives verified by a Medical Review Officer (MRO) by type of test, type of drug and employee category. This data, along with the number of tests performed, permits the calculation of positive rates necessary to determine the extent of drug use and the specific drugs detected in the various categories of employees. Further, analysis of this data over time will provide a measure of the effectiveness of the drug testing rules in deterring drug use.

5. Number of negatives verified by a MRO by type of test, and employer category. This data is needed to check compliance with the rules by category and to review the application of the components of the programs.

6. Number of persons denied a position as a covered employee following a verified positive drug test. This data provides an assessment of whether the testing program is being implemented as required, provides a measure of the impact of the drug testing rules on the industries, and yields information on the prevalence of drug use in the applicant pool.

7. Number of covered employees verified positive by a MRO, who were returned to service in covered positions during the reporting period. This data provides information on employer policy implementation regarding reentry requirements and rehabilitation of identified drug users.

8. Number of employees with tests verified positive by a MRO for multiple drugs. This data provides information on the extent of multi-drug use in the regulated industries.

9. Number of covered employees who refused to submit to a drug test required under this part, and the action taken in response to the refusal(s). This data provides information on employer policy implementation regarding refusals and subsequent employer actions.

10. Number of covered employees and supervisors who have received required training during the reporting period. This data provides information on training provided during the current reporting period and a cumulative count of covered employees and supervisory personnel on payroll as of December 31 who have received the required drug training.

A new appendix D to part 219 would set forth a standard form to provide the data required by this regulation. Comments are specifically requested on the form and instructions.

Request for Comments

FRA requests written comment on these revised annual reporting requirements. FRA will make available an opportunity for oral presentations, as required by section 202 of the Federal Railroad Safety Act of 1970, upon request within the period specified under "DATES" above.

FRA specifically solicits comment on several issues. FRA is interested in comments on the utility and feasibility of gathering, maintaining, verifying, organizing and reporting the additional data that will be necessary to complete the proposed MIS data collection form. FRA believes that most of the required data elements can be readily derived from data already maintained under its existing data retention or reporting requirements, but realizes that many smaller railroads are not currently required to submit annual reports. These railroads have already been required, however, to submit and implement random testing plans, conduct pre-employment testing, and maintain records as required by § 219.713. FRA invites specific comment as to whether smaller railroads should be required to maintain and file the comprehensive data specified in the annual MIS reports.

In addition, FRA is aware that the proposed reports will include data that railroads are not required to report under its current annual reporting rule, *e.g.*, pre-employment testing results. FRA requests comment on the practicality of adding these new data elements to a railroad's established annual reporting system and invites suggestions as to alternative data collection methods.

The MIS as proposed will necessitate changes in railroad reporting systems. FRA is interested in any structural impediments railroads may face in modifying their data retrieval systems to fulfill the new reporting requirements. OST/FRA contemplate that the report filed in February 1994 should cover the entire 12 months of 1993, but one option would be to permit railroads to report data from the first half of 1993 in the old reporting format and data from the second half of 1993 in the new MIS format. Delay of the MIS requirements would allow railroads time to restructure the recordkeeping systems that they already have in place. FRA is interested in comments on whether this adjustment time is necessary, and also invites other options from commenters.

FRA notes that, although the adapted form appears lengthy, essentially no respondents would find it necessary to enter data (other than "0" to indicate no relevant activity) in all of the spaces provided. Commenting railroads are thus requested to focus on those elements actually relevant to their individual programs.

FRA reserves the right to modify the proposed reporting requirements in light of comments received.

Executive Order 12291 and DOT Regulatory Policy and Procedures

This proposal is not "major" under Executive Order 12291. It is significant under the Department of Transportation's Regulatory Policy and Procedures.

This notice proposes standardizing reporting requirements within DOT with retention of some rail-specific requirements. The purpose is to provide OST and FRA with critical data in order to make necessary policy and program evaluations which could lead to policy changes which make the rule more effective for safety. This data will provide significant input to evaluate the cost effectiveness of the programs and each part of the program. This modification would provide overall benefit to public safety by enhancing FRA's ability to ensure that this critical program is operating effectively. FRA anticipates that this requirement will cause minimal change in compliance burden and cost. Most of the program data requested would have been maintained in the implementation of an effective drug program under the current rule.

The Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 was enacted by Congress to ensure that small entities are not unnecessarily and disproportionately burdened by

Government regulations. FRA certifies that this proposal would not have a significant economic impact on a substantial number of small entities.

FRA specifically solicits comment on means to limit any reporting burden on small entities and regarding the impact of requiring reporting of small railroads not subject to current requirements (certain railroads with fewer than 400,000 manhours of employment).

Federalism Implications

The proposed rulemaking action would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, FRA has determined that this notice does not have sufficient federalism implications to warrant preparation of a Federalism assessment.

Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 96–511) applies to this notice of proposed rulemaking because it changes several approved collections of information and initiates several new information collection requirements. OST and FRA estimate that preparation of the annual report would require approximately 12–16 hours in the case of a small company with two million or less manhours, 8 days-2 weeks in the case of a medium company with two million to ten million manhours, and 3 weeks-2 months in the case of a large company with in excess of ten million manhours. FRA solicits comments on the accuracy of the estimates, the practical utility of the information, and alternative methods that might be less burdensome to obtain this information. Persons desiring to comment on this topic should address their views to Gloria D. Swanson, Federal Railroad Administration, room 8314, 400 Seventh Street, SW., Washington, DC 20590 and to the Regulatory Policy Branch (OMB No. 2130–526), Office of Management and Budget, New Executive Office Building, 726 Jackson Place, NW., Washington, DC 20530, Attention: Desk Officer for FRA. Copies of any such comments should also be submitted to the docket of this rulemaking at the address provided above.

FRA will request OMB approval of these revised information collection requirements. A **Federal Register** notice will be published when Paperwork Reduction Act approval is obtained. Current information collection requirements under part 219 were approved under OMB No. 2130–0526.

List of Subjects

49 CFR Part 217

Railroad operating rules, Railroad safety, Reporting and recordkeeping requirements.

49 CFR Part 219

Control of alcohol and drug use, Railroad safety, Reporting and recordkeeping requirements.

In consideration of the foregoing, FRA proposes to amend parts 217 and 219, title 49, Code of Federal Regulations as follows:

PART 217—[AMENDED]

1. The authority citation for part 217 continues to read as follows:

Authority: 45 U.S.C. 431, 437 and 438, as amended; Pub. L. 100–342; and 49 CFR 1.49(m).

2. Section 217.13 is amended by deleting paragraph (d).

PART 219—[AMENDED]

3. The authority citation for part 219 continues to read as follows:

Authority: 45 U.S.C. 431, 437, and 438, as amended; Pub. L. 100–342; and 49 CFR 1.49(m).

4. Part 219 is amended by adding a new § 219.803 to subpart I, as follows:

Subpart I—Annual Report

* * * * *

§ 219.803 Reporting drug misuse prevention program results in a management information system.

(a) Each railroad shall submit to FRA an annual report covering the calendar year, summarizing the results of its drug misuse prevention program.

(b) Each railroad that is subject to more than one DOT agency drug regulation shall identify each employee covered by the regulations of more than one DOT agency. The identification will be by the total number and category of covered functions. Prior to conducting any drug test on a covered employee subject to the regulations of more than one DOT agency, the railroad shall determine which DOT agency regulation authorizes or requires the test. The test result information shall be directed to the appropriate DOT agency or agencies.

(c) Each railroad shall ensure the accuracy and timeliness of each report submitted by the railroad or a consortium.

(d) Each railroad shall submit the required annual reports no later than February 15 of each year. The report shall be submitted on the form specified by the FRA. Each report shall address each of the following data elements:

(1) Number of covered employees by employee category (*i.e.*, train service, engine service, dispatcher/operator, signal service, other).

(2) Number of covered employees in each category subject to testing under the anti-drug rules of more than one DOT agency, identified by each agency.

(3) Number of specimens collected by type of test (*e.g.*, pre-employment/transfer, random, post-positive return to duty, etc.), type of authority (FRA, or, for accident/incident and operating/safety rule testing for cause testing, railroad) and employee category.

(4) Number of positives verified by a Medical Review Officer (MRO) by type of test, type of drug and employee category.

(5) Number of negatives verified by a MRO by type of test, and employer category.

(6) Number of persons denied a position as a covered employee following a verified drug test.

(7) Number of covered employees verified positive by an MRO, who were returned to duty in covered positions during the reporting period.

(8) Number of employees with tests verified positive by an MRO for multiple drugs.

(9) Number of covered employees who refused to submit to a drug test required under this part, and the action taken in response to the refusal(s).

(10) Number of covered employees and supervisors who have received required training during the reporting period.

5. Part 219 is amended by adding a new appendix D as follows:

Appendix D to Part 219—Format and Instructions for Annual Report

Issued in Washington, DC, on December 2, 1992.

Andrew H. Card, Jr.,

Secretary.

Gilbert E. Carmichael,

Administrator, Federal Railroad Administration.

BILLING CODE 4910–06–M

APPENDIX B - DRUG AND ALCOHOL TESTING MIS DATA COLLECTION FORM

GENERAL INSTRUCTIONS

This reporting form includes three parts. Collectively, these parts address the data elements required in the Federal Railroad Administration (FRA) and U.S. Department of Transportation (DOT) drug and alcohol testing regulations. Each part of the form is preceded by instructions which outline and explain the information requested and indicate the probable sources for this information. The three parts of the form are:

Section	Instructions Pages	Reporting Form Pages
I. ORGANIZATIONAL INFORMATION	i-ii	1-2
II. DRUG TESTING INFORMATION	iii-vii	3-10
III. ALCOHOL TESTING INFORMATION	viii-xii	11-17

I. ORGANIZATIONAL INFORMATION

INSTRUCTIONS

This part of the reporting form includes two sections. These sections, the page number for the instructions, and the page location on the reporting form are:

Section	Instructions Page	Reporting Form Page
A. RAILROAD EMPLOYER INFORMATION	i	1
B. COVERED EMPLOYEES	ii	2

Page 1 **RAILROAD EMPLOYER INFORMATION** (Section A) requires the company name for which the report is done and a current address. Below this, a signature, date, and current telephone (including the area code) are required certifying the correctness and completeness of the form.

Page 2

COVERED EMPLOYEES (Section B) requires a count for each Hours of Service Act employee category that must be tested under FRA/DOT regulations. For FRA this includes the following categories "Engine Service", "Train Service", "Dispatcher/Operator", "Signal Service", and "Other." The **OTHER** category is a count of employees performing covered service that are not included in specific preceding categories. Examples include yardmasters, hostlers (non-engineer craft), bridge tenders, switch tenders, etc. These counts should be based on the company records for the reported year. The **TOTAL** is a count of **all** covered employees for **all** categories combined, i.e., the sum of the column.

Additional information must be completed if your company employs personnel who perform duties covered by the anti-drug rules of more than one DOT operating administration. **NUMBER OF EMPLOYEES COVERED BY MORE THAN ONE DOT OPERATING ADMINISTRATION**, requires that you identify the number of employees in each employee category under the appropriate additional operating administration(s).

For Office Use Only

FRA DRUG AND ALCOHOL TESTING MIS DATA COLLECTION FORM

YEAR COVERED BY THIS REPORT: 19___

A. RAILROAD EMPLOYER INFORMATION

Company _____

Address _____

_____

_____

I, the undersigned, certify the attached Federal Railroad Administration Drug and Alcohol Management Information System Data Collection Form, is to the best of my knowledge and belief, a true, correct, and complete form for the period stated.

_____
Signature

_____
Title

_____
Date of Signature

_____
Phone Number

Title 18, U.S.C. Section 1001, makes it a criminal offense subject to a maximum fine of $10,000, or imprisonment for not more than 5 years, or both, to knowingly and willfully make or cause to be made any false or fraudulent statements or representations in any matter within the jurisdiction of any agency of the United States. The willful falsification of any information in this report may also subject the submitter to civil or criminal prosecution under Title 45, U.S.C. Section 438(e).

B. COVERED EMPLOYEES

COVERED EMPLOYEES						
EMPLOYEE CATEGORY	NUMBER OF COVERED EMPLOYEES	NUMBER OF EMPLOYEES COVERED BY MORE THAN ONE DOT OPERATING ADMINISTRATION				
		FAA	FHWA	FTA	RSPA	USCG
Engine Service						
Train Service						
Dispatcher/Operator						
Signal Service						
Other*						
TOTAL						

*Includes yardmasters, hostlers (non-engineer craft), bridge tenders, switch tenders, and other miscellaneous employees performing covered service as defined in 49 CFR 228.5 (c).

II. DRUG TESTING INFORMATION

INSTRUCTIONS

The following instructions are to be used as a guide for completing the drug testing information in the Federal Railroad Administration (FRA) and the U.S. Department of Transportation (DOT) **Drug and Alcohol Testing Management Information System Data Collection Form**. These instructions outline and explain the information requested. A sample testing results table with a narrative explanation is provided on pages iv-vi as an example to facilitate the process of completing the form correctly.

This part of the reporting form includes four sections. These sections address the data elements required in the regulations. These sections, the page number for the instructions, and the page location on the reporting form are:

Section	Instructions Page	Reporting Form Page
A. JOB APPLICANT/COVERED SERVICE TRANSFER TESTING INFORMATION	iv	4
B. EMPLOYEE TESTING	vi	5-9
C. OTHER TESTING/PROGRAM INFORMATION	vii	10
D. TRAINING/EDUCATION	vii	10

Sections A and B are used to summarize the drug testing results for covered employees. There are seven tables to be completed (one in Section A and six in Section B). The first table (Section A) is where you enter the data on pre-employment testing. The six tables in Section B are for entering drug testing data on random testing, for cause testing (one table each for "for cause testing" due to accidents/injuries, rules violations, and reasonable suspicion), post-positive return to service testing, and follow-up testing, respectively. Items necessary to complete these tables include:

1) the number of specimens collected in each employee category;
2) the number of specimens tested which were verified negative and verified positive for any drug(s); and
3) individual counts of those specimens which were verified positive for each of the five drugs.

Do not include results of quality control (QC) samples submitted to the testing laboratory in any of the tables.

A sample table with detailed instructions is provided for Section A, **JOB APPLICANT/COVERED SERVICE TRANSFER TESTING INFORMATION**. The format and explanations used for the sample table apply to all seven of the tables in Sections A and B.

Information on actions taken with those persons testing positive is required at the end of both Sections A and B. Specific instructions for providing this latter information are given after the instructions for completing the tables in Sections A and B.

Page 4

JOB APPLICANT/COVERED SERVICE TRANSFER TESTING INFORMATION (Section A) requires information for pre-employment and covered service transfer testing. All numbers entered into this table should be separated into the category of employment for which the applicant was applying/transferring. A sample table with example numbers is presented on page v.

Three types of information are necessary to complete the left side of this table. The first blank column with the heading "**NUMBER OF SPECIMENS COLLECTED,**" requires a count for all collected specimens by employee category. It should not include refusals to test. The second blank column with the heading "**NUMBER OF SPECIMENS VERIFIED NEGATIVE,**" requires a count for all completed tests by employee category that were verified negative by your Medical Review Officer (MRO).

The third blank column with the heading "**NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS,**" refers to the number of specimens provided by job applicants that were verified positive. "Verified positive" means the results were verified by your MRO.

The right hand portion of this table, with the heading "**NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG,**" requires counts of positive tests for each of the five drugs for which tests were done, i.e., marijuana, cocaine, phencyclidine, opiates, and amphetamines. The number of specimens positive for each drug should be entered in the appropriate column for that drug type. Again, "verified positive" refers to test results verified by your MRO.

If an applicant/transferee tested positive for more than one drug, for example, both marijuana and cocaine, that person's positive results would be included once in each of the appropriate columns.

Each column in the table should be added and the answer entered in the row marked "**TOTAL**".

A sample table is provided on page v illustrating this procedure with example numbers.

Page 4

Below the table for **PRE-EMPLOYMENT AND "COVERED SERVICE" TRANSFER TESTING** is a box with the heading "**Number of applicants/transfers denied employment/transfer in a covered position following a verified positive drug test**". This is simply a count of those persons who were not hired/transferred into a covered position because they tested positive for one or more drugs.

SAMPLE APPLICANT TEST RESULTS TABLE

The following example is for Section A, **JOB APPLICANT/COVERED SERVICE TRANSFER TESTING INFORMATION**, which summarizes pre-employment/covered service transfer testing results. The procedures detailed here also apply to the tables in Section B which require you to summarize testing results for employees. This example will use the categories "Engine Service" and "Train Service" to illustrate the procedures for completing the form.

A — Urine specimens were collected for 157 job applicants for engine service positions during the reporting year. This information is entered in the first blank column of the table in the row marked "Engine Service".

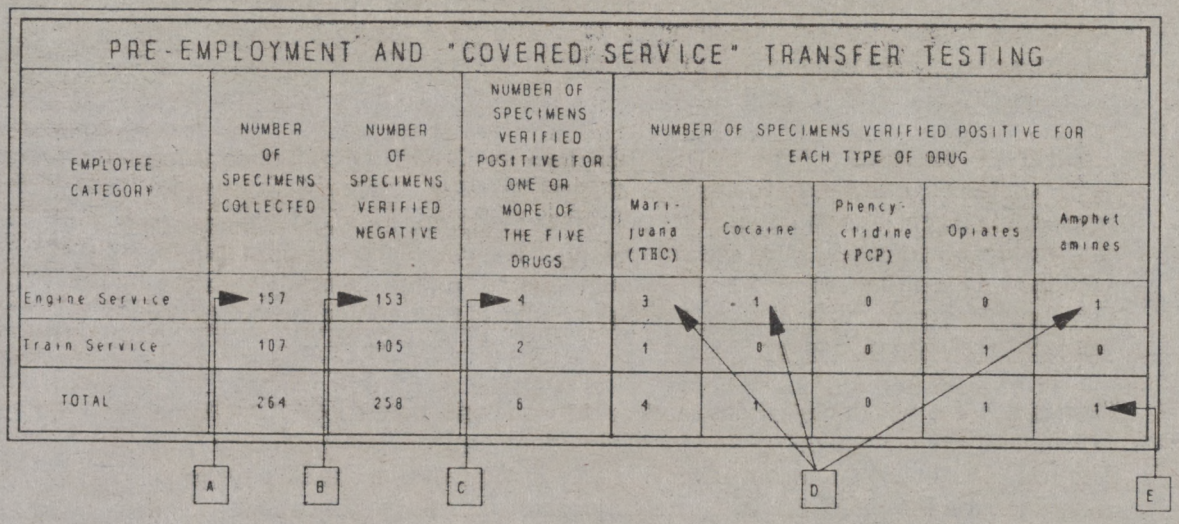
B — The Medical Review Officer (MRO) for your company reported that 153 of those 157 specimens from applicants for engine service positions were negative (i.e., no drugs were detected). Enter this information in the second blank column of the table in the row marked "Engine Service".

C — The MRO for your company reported that 4 of those 157 specimens from applicants for engine service positions were positive (i.e., a drug or drugs were detected). Enter this information in the third blank column of the table in the row marked "Engine service".

D — With the 4 specimens that tested positive, the following drugs were detected:

Specimen	Drugs
#1	Marijuana
#2	Amphetamines
#3	Marijuana and Cocaine (Multi-drug specimen)
#4	Marijuana

Marijuana was detected in three (3) specimens, cocaine in one (1), and amphetamines in one (1). This information is entered in the columns on the right hand side of the table under each of these drugs. Since two different drugs were detected in specimen #3 (multi-drug), entries are made in both the marijuana and the cocaine columns for this specimen. Information on multi-drug specimens must also be entered in Section C, **OTHER TESTING/PROGRAM INFORMATION**, on page 10 of the reporting form.



Please note that the sample data collection form also has information for train service workers on line two. The same procedures outlined for engine service positions should be followed for entering the data

on train service workers. With applicants for train service positions, 107 specimens were collected resulting in 105 verified negatives and 2 verified positives -- 1 for marijuana and 1 for opiates. This information is entered in the row marked "Train Service"

E

The last row, marked "TOTAL", requires you to add the numbers in each of the columns. With this example, 157 specimens from applicants for engine service positions were collected and 107 for applicants for train service positions. The total for that column would be 264 (i.e., 157+107). The same procedure should be used for each column, i.e., add all the numbers in that column and place the answer in the last row.

Note that adding up the numbers for each type of drug in a row ("NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG") will not always match the number entered in the third column, "NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS". The total for the numbers on the right hand side of the table may differ from the number of specimens testing positive since some specimens may contain more than one drug.

Remember that the same procedures indicated above are to be used for completing all of the tables in Sections A and B.

Pages 5-9 **EMPLOYEE TESTING** (Section B), as indicated, requires information for company employees in **covered positions** only. A separate table must be completed for each category of test. These categories include: (1) random testing, (2) for cause testing due to accidents/injuries, (3) for cause testing due to rule violations, (4) for cause testing due to reasonable suspicion, (5) post-positive return to service testing, and (6) follow-up testing. These tables are to be filled out like the sample table above. Again, these numbers **do not** include refusals for testing.

Pages 5-6 Following the table that summarizes **RANDOM TESTING**, you must provide **Additional Testing Data** on those employees who have tested positive. This includes disciplinary actions and results of evaluations and rehabilitations.

Pages 6 8 **EMPLOYEE TESTING - FOR CAUSE TESTING INFORMATION** requires three separate tables, one for accidents/injuries, one for rules violations, and one for reasonable suspicion. In the shaded portion of the tables for accidents/injuries and rules violations you must indicate whether the information in the table for testing was conducted under FRA authority or under railroad authority. **Reasonable suspicion testing is mandatory under FRA regulations and not subject to railroad discretion.**

The tables for accidents/injuries and rules violations contain two additional columns which must be completed for testing done under railroad authority. The first additional column, labeled "Other Prohibited," requires that you list any drugs, other than the five listed, that are tested under railroad rule (e.g., butalbital). The rightmost column, labeled "Combined," requires that you indicate whether any of these positives were in combination with one or more positive findings for the five

drugs (same specimen). If yes, you must attach details (e.g., 2 marijuana/butalbital).

Page 9 — Following the table that summarizes **POST-POSITIVE RETURN TO SERVICE TESTING**, you must provide counts for employees who have tested positive and are currently in, or have completed rehabilitation, and have returned to work in a covered position. Report this information only for employees who tested positive during this reporting period.

Page 10 — **OTHER TESTING/PROGRAM INFORMATION** (Section C) requires that you complete a table dealing with specimens positive for more than one drug and a table dealing with employees who refused to submit to a drug test.

Page 10 — **SPECIMENS VERIFIED POSITIVE FOR MORE THAN ONE DRUG** requires information on specimens that contained more than one drug. Indicate the **EMPLOYEE CATEGORY** and the **NUMBER OF VERIFIED POSITIVES**, then check the appropriate columns indicating the combination of drugs reported as positive. For example, if marijuana and cocaine were detected in 3 engine service specimens, then you would write "Engine service" as the employee category, "3" as the number of verified positives, and "3" in the columns for "Marijuana" and "Cocaine". If marijuana and opiates were detected in 2 engine service specimens, then you would write "Engine service" as the employee category, "2" as the number of verified positives, and "2" in the columns for "Marijuana" and "Opiates".

Page 10 — **EMPLOYEES WHO REFUSED TO SUBMIT TO A DRUG TEST** requires information on the **NUMBER OF COVERED EMPLOYEES** who refused to submit to a drug test required under this regulation, and a description of the **ACTION TAKEN** in response to the refusal. An example of an action taken would be "removed from covered duties pending termination".

Page 10 — **TRAINING/EDUCATION** (Section D) requires information on the number of supervisory personnel who have received the required drug training during the current reporting period.

READ BEFORE COMPLETING THE REMAINDER OF THIS FORM:

1. All items refer to the **current** reporting period **only** (for example, January 1, 1993 - December 31, 1993).

2. This report is only for testing **REQUIRED TO BE REPORTED BY THE FEDERAL RAILROAD ADMINISTRATION (FRA) AND THE U.S. DEPARTMENT OF TRANSPORTATION (DOT)**:

   - Results should be reported only for employees in **COVERED POSITIONS** as defined by FRA/DOT drug testing regulations.

   - The information requested should include testing for marijuana (THC), cocaine, phencyclidine (PCP), opiates, and amphetamines using the standard procedures required by DOT regulation 49 CFR Part 40 and other drugs where appropriate.

3. Information on refusals for testing should only be reported in Section C ("OTHER TESTING/PROGRAM INFORMATION"). Do not include refusals for testing in other sections of this report.

4. Do not include the results of any quality control (QC) samples submitted to the testing laboratory in any of the tables.

5. Complete all items; DO NOT LEAVE ANY ITEM BLANK. If the value for an item is zero (0), place a zero (0) on the form.

This part of the form requires information on VERIFIED POSITIVE and VERIFIED NEGATIVE drug tests. These are the results that are reported to you by your Medical Review Officer (MRO).

A. JOB APPLICANT/COVERED SERVICE TRANSFER TESTING INFORMATION

PRE-EMPLOYMENT AND "COVERED SERVICE" TRANSFER TESTING								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Engine Service								
Train Service								
Dispatcher/ Operator								
Signal Service								
Other								
TOTAL								

Number of applicants/transfers denied employment/transfer in a covered position following a verified positive drug test: [ ]

B. EMPLOYEE TESTING - RANDOM TESTING INFORMATION

RANDOM TESTING								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Engine Service								
Train Service								
Dispatcher/ Operator								
Signal Service								
Other								
TOTAL								

Additional Testing Data

1. Number of disciplinary actions taken (attach narrative statement describing type of disciplinary action taken): ☐

2. Number of employees referred for evaluation: ☐

3. Number of employees evaluated as not requiring formal treatment: ☐

4. Number of employees evaluated as requiring outpatient treatment: ☐

5. Number of employees evaluated as requiring inpatient treatment: ☐

B EMPLOYEE TESTING - RANDOM TESTING INFORMATION (Continued)

Additional Testing Data

6. Number of employees failing to complete rehabilitation (as determined by clinical judgement or positive test on return-to-work urine analysis): [ ]

7. Number of employees who completed rehabilitation determined after investigation to have been involved in subsequent drug disciplinary offenses: [ ]

B. EMPLOYEE TESTING - TESTING FOR CAUSE INFORMATION

Note: If you used both FRA authority and railroad authority to conduct for cause drug testing for accidents/injuries or rules violations, please fill out a separate chart for each authority, i.e., one for FRA tests and one for railroad tests (extra sheets attached).

FOR CAUSE DRUG TESTING
DUE TO ACCIDENT*/INJURY
***(Accidents NOT qualifying under 49 CFR Part 219 Subpart C)**

(Testing Conducted Under: FRA Rule___ Railroad Rule___)

EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG						
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines	Other Prohibited [1]	Combined [2]
Engine Service										
Train Service										
Dispatcher/ Operator										
Signal Service										
Other										
TOTAL										

B. EMPLOYEE TESTING - TESTING FOR CAUSE INFORMATION (continued)

FOR CAUSE DRUG TESTING
DUE TO RULES VIOLATION

(Testing Conducted Under: FRA Authority___ Railroad Authority__)

EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG						
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines	Other Prohibited [1]	Combined [2]
Engine Service										
Train Service										
Dispatcher/ Operator										
Signal Service										
Other										
TOTAL										

[1] Other drugs tested under railroad rule where the use was prohibited by 49 CFR 219.102.

[2] Indicate whether any of these positives were in combination with one or more positive findings for the five drugs (same specimen). If yes, attach details (e.g., 2 marijuana/butalbital).

B. EMPLOYEE TESTING - TESTING FOR CAUSE INFORMATION (continued)

FOR CAUSE DRUG TESTING REASONABLE SUSPICION								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Engine Service								
Train Service								
Dispatcher/ Operator								
Signal Service								
Other								
TOTAL								

OPERATIONAL TESTS AND INSPECTIONS

The following items request information concerning the railroad's program for supervising its employees and ensuring that they are free from impairments caused by drugs:

1. Total number of covered employees observed in documented tests and inspections related to enforcement of the railroad's rules and policies on drug use (including, but not limited to, observations for which urine tests were conducted and observations after accidents/incidents and rule violations): [ ]

2. Number of covered employees charged with a violation of the railroad's Rule G or similar rule or policy: [ ]

B. EMPLOYEE TESTING - POST-POSITIVE RETURN TO SERVICE INFORMATION

POST-POSITIVE RETURN TO SERVICE TESTING								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Engine Service								
Train Service								
Dispatcher/ Operator								
Signal Service								
Other								
TOTAL								

Note: The following question relates to post-positive 49 CFR Part 40 and Part 219 (other than Subpart C, "FRA Post Accident Testing").

Number of employees, currently in or having completed rehabilitation or otherwise qualified to return to duty, who have returned to work in a covered position during this reporting period: [ ]

B. EMPLOYEE TESTING - FOLLOW-UP TESTING INFORMATION

FOLLOW-UP TESTING								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Engine Service								
Train Service								
Dispatcher/ Operator								
Signal Service								
Other								
TOTAL								

C. OTHER TESTING/PROGRAM INFORMATION

SPECIMENS VERIFIED POSITIVE FOR MORE THAN ONE DRUG						
EMPLOYEE CATEGORY	NUMBER OF VERIFIED POSITIVES	Marijuana (THC)	Cocaine	Phency-clidine (PCP)	Opiates	Amphet-amines

EMPLOYEES WHO REFUSED TO SUBMIT TO A DRUG TEST	
NUMBER OF COVERED EMPLOYEES	ACTION TAKEN

D. TRAINING/EDUCATION

Training During Current Reporting Period

Number of supervisory personnel who have received initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable drug use as required by FRA drug testing regulations: [ ]

Number of supervisory personnel who have received recurrent or refresher training on the specific contemporaneous physical, behavioral, and performance indicators of probable drug use: [ ]

III. ALCOHOL TESTING INFORMATION

INSTRUCTIONS

The following instructions are to be used as a guide for completing the alcohol testing information for the Federal Railroad Administration (FRA) and the U.S. Department of Transportation (DOT) **Drug and Alcohol Testing Management Information System Data Collection Form**. These instructions outline and explain the information requested. A sample testing results table with a narrative explanation is provided on pages ix-xi as an example to facilitate the process of completing the form correctly.

This part of the reporting form includes four sections. These sections address the data elements required in the regulations. These sections, the page number for the instructions, and the page location on the reporting form are:

Section	Instructions Page	Reporting Form Page
A. JOB APPLICANT/COVERED SERVICE TRANSFER TESTING INFORMATION	ix	11
B. EMPLOYEE TESTING	xii	12-16
C. OTHER TESTING/PROGRAM INFORMATION	xi	16-17
D. TRAINING/EDUCATION	xii	17

Sections A and B are used to summarize the alcohol testing results for covered employees. There are seven tables to be completed (one in Section A and six in Section B). The first table (Section A) is where you enter the data on pre-employment/pre-duty testing. The six tables in Section B are for entering alcohol testing data for random testing, for cause testing (one table each for "for cause testing" due to accidents/injuries, rules violations, and reasonable suspicion), post-positive return to service testing, and follow-up testing, respectively. Items necessary to complete these tables include:

1) the number of initial alcohol tests performed for each employee category;
2) the number of confirmatory alcohol tests performed for each employee category;
3) the number of confirmatory test results which were equal to or greater than 0.04; and
4) the number of confirmatory test results which were equal to or greater than 0.02, but less than 0.04.

A sample table with detailed instructions is provided for Section A, **JOB APPLICANT/COVERED SERVICE TRANSFER TESTING INFORMATION**. The format and explanations used for the sample table apply to all seven of the tables in Sections A and B.

Information on actions taken with those persons whose alcohol test results were 0.04 or greater is required at the end of both Sections A and B. Specific instructions for providing this latter information are given after the instructions for completing the tables in Sections A and B.

Page 11 JOB APPLICANT/COVERED SERVICE TRANSFER TESTING INFORMATION (Section A) requires information for pre-employment/pre-duty and covered service transfer testing. All numbers entered into this table should be separated into the category of employment for which the applicant was applying/transferring. A sample table with example numbers is presented on page x.

Four types of information are necessary to complete the left side of this table. The first blank column with the heading "**NUMBER OF INITIAL TESTS**" requires a count of all initial alcohol tests performed for each employee category. It should not include refusals to test. The second blank column with the heading "**NUMBER OF CONFIRMATORY TESTS**" requires a count of all confirmatory alcohol tests performed for each employee category.

The third blank column with the heading "**NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04**" requires a count for each employee category.

The fourth blank column with the heading "**NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04**" requires a count for each employee category.

Each column in the table should be added and the answer entered in the row marked "**TOTAL**".

A sample table is provided on page x with example numbers.

Page 11 Below the table for pre-employment testing information is a box with the heading "**Number of applicants/transfers denied employment/transfer following an alcohol test indicating an alcohol concentration of 0.04 or greater**". Enter the appropriate number in the box provided.

SAMPLE APPLICANT TEST RESULTS TABLE

The following example is for Section A, **JOB APPLICANT TESTING INFORMATION**, which summarizes pre-employment/pre-duty testing results. The procedures detailed here also apply to the tables in Section B which require you to summarize testing results for employees. This example will use the categories "Engine Service" and "Train Service" to illustrate the procedures for completing the form.

A Initial tests were performed on 157 job applicants for engine service positions during the reporting year. This information is entered in the first blank column of the table in the row marked "Engine Service".

B Confirmatory tests were necessary for 6 of the 157 applicants for engine service positions. Enter this information in the second blank column of the table in the row marked "Engine Service". The confirmatory test results for these 6 applicants were the following:

Applicant	Confirmation Result
#1	0.06
#2	0.01
#3	0.11
#4	0.04
#5	0.03
#6	0.02

C The confirmatory test results for 3 of the applicants for engine service positions were equal to or greater than 0.04. Enter this information in the third blank column of the table in the row marked "Engine Service".

D The confirmatory test results for 2 of the applicants for engine service positions were equal to or greater than 0.02, but less than 0.04. Enter this information in the fourth blank column of the table in the row marked "Engine Service".

E The last row, marked "TOTAL", requires you to add the numbers in each of the columns. With this example, 157 applicants for engine service positions and 107 applicants for train service positions were subjected to initial tests. The total for that column would be 264 (i.e., 157 + 107). The same procedure should be used for each column. (i.e., add all the numbers in that column and place the answer in the last row).

PRE-EMPLOYMENT/PRE-DUTY TESTING

EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0 04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0 02 BUT LESS THAN 0 04
Engine Service	157	6	3	2
Train Service	107	3	1	0
TOTAL	264	9	4	2

A B C D E

Please note that our sample data collection form also has information for train service workers on line two. The same procedures outlined for engine service should be followed for entering the data on train service workers. With applicants for train service positions, 107 initial tests were conducted resulting in 3 confirmatory tests. The confirmatory test result for 1 of the train service applicants was equal to or

greater than 0.04; no results were equal to or greater than 0.02, but less than 0.04. This information is entered in the row marked "Train Service".

Note that adding up the numbers for confirmation results in columns three and four will not always match the number entered in the second column, "NUMBER OF CONFIRMATORY TESTS". These numbers may differ since some confirmatory test results may be less than 0.02.

Remember that the same procedures indicated above are to be used for completing all of the tables in Sections A and B.

Pages 12-16 **EMPLOYEE TESTING** (Section B), as indicated, requires information for company employees in **covered positions** only. A separate table must be completed for each category of test. These categories include: (1) random testing, (2) for cause testing due to accidents/injuries, (3) for cause testing due to rule violations, (4) for cause testing due to reasonable suspicion, (5) post-positive return to service testing, and (6) follow-up testing. These tables are to be filled out like the sample table above. Again, these numbers **do not** include refusals for testing.

Pages 12-13 Following the table that summarizes **RANDOM TESTING**, you must provide **Additional Testing Data** on those employees who have tested positive. This includes disciplinary actions and the results of evaluations and rehabilitations.

Pages 13-15 **EMPLOYEE TESTING** - **TESTING FOR CAUSE INFORMATION** requires three separate tables, one for accidents/injuries, one for rules violations, and one for reasonable suspicion. In the shaded portion of the accidents/injuries table and the rules violations table you must indicate whether the information in the table for testing was conducted under FRA authority or under railroad authority. **Reasonable suspicion testing is mandatory under FRA regulations and not subject to railroad discretion.**

Page 15 Following the table that summarizes **POST-POSITIVE RETURN TO SERVICE TESTING**, you must provide a count of the **"Number of employees with a confirmatory alcohol test indicating an alcohol concentration of 0.04 or greater who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in FRA regulations)"**. Report this information only for employees who were tested during this reporting period.

Pages 16-17 **OTHER TESTING/PROGRAM INFORMATION** (Section C) requires that you provide information on employees who tested positive for drugs and alcohol (at the same time), information on violations of other alcohol provisions (not necessarily resulting in positive alcohol tests), and information on employees who refused to submit to an alcohol test.

Page 16 **Number of employees administered drug and alcohol tests at the same time resulting in a verified positive drug test and an alcohol test indicating an alcohol concentration of 0.04 or greater**, requires that a count of all such employees be entered in the indicated box.

Page 16 **VIOLATIONS OF OTHER ALCOHOL PROVISIONS/PROHIBITIONS OF THIS REGULATION**, requires information on the **NUMBER OF COVERED EMPLOYEES** committing such a violation, a description of the **VIOLATION** committed (e.g., pre-duty alcohol use, on duty alcohol use, on duty alcohol possession), and a description of the **ACTION TAKEN** in response to the violation.

Page 17 **EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST** requires information on the **NUMBER OF COVERED EMPLOYEES** who refused to submit to an alcohol test as required under this regulation, and a description of the **ACTION TAKEN** in response to the refusal.

Page 17 **TRAINING/EDUCATION** (Section D) requires information on the number of supervisory personnel who have received the required alcohol training during the current reporting period.

READ BEFORE COMPLETING THE REMAINDER OF THIS FORM:

1. All items refer to the **current** reporting period **only** (for example, January 1, 1993 - December 31, 1993).

2. This report is only for testing **REQUIRED TO BE REPORTED BY THE FEDERAL RAILROAD ADMINISTRATION (FRA) AND THE U.S. DEPARTMENT OF TRANSPORTATION (DOT)**:

   - Results should be reported only for employees in **COVERED POSITIONS** as defined by FRA/DOT alcohol testing regulations.
   - The information requested should only include testing for alcohol using the standard procedures required by DOT regulation 49 CFR Part 40.

3. Complete all items; DO NOT LEAVE ANY ITEM BLANK. If the value for an item is zero (0), place a zero (0) on the form.

A. JOB APPLICANT/COVERED SERVICE TRANSFER TESTING INFORMATION

PRE-EMPLOYMENT/PRE-DUTY TESTING				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Engine Service				
Train Service				
Dispatcher/Operator				
Signal Service				
Other				
TOTAL				

Number of persons denied a position as a covered employee following a pre-employment/pre-duty alcohol test indicating an alcohol concentration of 0.04 or greater: [ ]

B. EMPLOYEE TESTING - RANDOM TESTING INFORMATION

RANDOM TESTING				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Engine Service				
Train Service				
Dispatcher/Operator				
Signal Service				
Other				
TOTAL				

Additional Testing Data

1 Number of disciplinary actions taken (attach narrative statement describing type of disciplinary action taken): ☐

2. Number of employees referred for evaluation: ☐

3. Number of employees evaluated as not requiring formal treatment: ☐

4. Number of employees evaluated as requiring outpatient treatment: ☐

5. Number of employees evaluated as requiring inpatient treatment: ☐

B. EMPLOYEE TESTING - RANDOM TESTING INFORMATION (continued)

Additional Testing Data

6 Number of employees failing to complete rehabilitation (as determined by clinical judgement or positive test on return-to-work): [ ]

7 Number of employees who completed rehabilitation determined after investigation to have been involved in subsequent alcohol disciplinary offenses: [ ]

B EMPLOYEE TESTING - TESTING FOR CAUSE INFORMATION

Note: If you used both FRA authority and railroad authority to conduct for cause breath testing for accidents/injuries or rules violations, please fill out a separate chart for each authority, i.e., one for FRA tests and one for railroad tests (extra sheets attached).

FOR CAUSE ALCOHOL TESTING
DUE TO ACCIDENT*/INJURY
***(Accidents NOT qualifying under 49 CFR Part 219 Subpart C)**

(Testing Conducted Under: FRA Rule ___ Railroad Rule ___)

EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Engine Service				
Train Service				
Dispatcher/Operator				
Signal Service				
Other				
TOTAL				

B. EMPLOYEE TESTING - TESTING FOR CAUSE INFORMATION (continued)

FOR CAUSE ALCOHOL TESTING DUE TO RULES VIOLATION (Testing Conducted Under: FRA Rule___ Railroad Rule___)				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Engine Service				
Train Service				
Dispatcher/Operator				
Signal Service				
Other				
TOTAL				

FOR CAUSE ALCOHOL TESTING REASONABLE SUSPICION				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Engine Service				
Train Service				
Dispatcher/Operator				
Signal Service				
Other				
TOTAL				

B. EMPLOYEE TESTING - TESTING FOR CAUSE INFORMATION (continued)

OPERATIONAL TESTS AND INSPECTIONS

The following items request information concerning the railroad's program for supervising its employees and ensuring that they are free from impairments caused by alcohol:

1. Total number of covered employees observed in documented tests and inspections related to enforcement of the railroad's rules and policies on alcohol use (including, but not limited to, observations for which breath tests were conducted and observations after accidents/incidents and rule violations): [ ]

2. Number of covered employees charged with a violation of the railroad's Rule G or similar rule or policy: [ ]

B. EMPLOYEE TESTING - POST-POSITIVE RETURN TO DUTY TESTING

POST-POSITIVE RETURN TO SERVICE TESTING				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Engine Service				
Train Service				
Dispatcher/Operator				
Signal Service				
Other				
TOTAL				

Number of employees with a confirmatory alcohol test indicating an alcohol concentration of 0.04 or greater who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in FRA regulations): [ ]

B. EMPLOYEE TESTING - FOLLOW-UP TESTING

FOLLOW-UP TESTING				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Engine Service				
Train Service				
Dispatcher/Operator				
Signal Service				
Other				
TOTAL				

C. OTHER TESTING/ PROGRAM INFORMATION

Number of employees administered drug and alcohol tests at the same time resulting in a verified positive drug test and an alcohol test indicating an alcohol concentration of 0.04 or greater: [ ]

VIOLATIONS OF OTHER ALCOHOL PROVISIONS/PROHIBITIONS OF THIS REGULATION		
NUMBER OF COVERED EMPLOYEES	VIOLATION	ACTION TAKEN

C. OTHER TESTING/PROGRAM INFORMATION (continued)

EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST	
NUMBER OF COVERED EMPLOYEES	ACTION TAKEN

D TRAINING/EDUCATION

Training During Current Reporting Period

Number of supervisors who have received the required training in determining the existence of reasonable suspicion of alcohol misuse: [ ]

CONTINUATION SHEET FOR PAGE 7 - EXTRA REPORT FORMS

B. EMPLOYEE TESTING - FOR CAUSE TESTING INFORMATION

FOR CAUSE DRUG TESTING
DUE TO ACCIDENT*/INJURY
*(Accidents NOT qualifying under 49 CFR Part 219 Subpart C)

(Testing Conducted Under: FRA Rule___ Railroad Rule___)

EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG						
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines	Other Prohibited [1]	Combined [2]
Engine Service										
Train Service										
Dispatcher/ Operator										
Signal Service										
Other										
TOTAL										

FOR CAUSE DRUG TESTING
DUE TO RULES VIOLATION

(Testing Conducted Under: FRA Authority___ Railroad Authority__)

EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG						
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines	Other Prohibited [1]	Combined [2]
Engine Service										
Train Service										
Dispatcher/ Operator										
Signal Service										
Other										
TOTAL										

CONTINUATION SHEET FOR PAGE 13 - EXTRA REPORT FORMS

B. EMPLOYEE TESTING - FOR CAUSE TESTING INFORMATION

FOR CAUSE ALCOHOL TESTING DUE TO ACCIDENT*/INJURY *(Accidents NOT qualifying under 49 CFR Part 219 Subpart C) (Testing Conducted Under: FRA Rule___ Railroad Rule___)				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Engine Service				
Train Service				
Dispatcher/Operator				
Signal Service				
Other				
TOTAL				

FOR CAUSE ALCOHOL TESTING DUE TO RULES VIOLATION (Testing Conducted Under: FRA Rule___ Railroad Rule___)				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Engine Service				
Train Service				
Dispatcher/Operator				
Signal Service				
Other				
TOTAL				

[FR Doc. 92-29684 Filed 12-10-92; 10:00 am]
BILLING CODE 4910-06-C

federal register

Tuesday
December 15, 1992

Part VI

Department of Transportation

Federal Transit Administration

49 CFR Parts 653 and 654
Drug and Alcohol Testing Programs; Proposed Rules

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

49 CFR Part 654

[Docket No 92–I]

RIN 2132–AA38

Prevention of Alcohol Misuse in Transit Operations

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: On October 28, 1991, President Bush signed the Omnibus Transportation Employee Testing Act of 1991, mandating the Federal Transit Administration to issue regulations on drug and alcohol testing for mass transit workers. This document proposes the agency's alcohol misuse prevention program. When finalized this rule should increase the safety of mass transit operations in general.

DATES: Comments on this proposed rule must be submitted by April 14, 1993.

ADDRESSES: Comments should be sent to the Rules Docket Clerk, Docket No.92–I, Federal Transit Administration, DOT, 400 Seventh St. SW., room 9316, Washington, DC 20590. Comments will be available for inspection at this address Monday through Friday from 9 a.m. through 5 p.m. If you would like acknowledgment of receipt of your comment please include a stamped, self-addressed postcard with your comment.

FOR FURTHER INFORMATION CONTACT: For legal questions contact Nancy M. Zaczek, Office of the Chief Counsel, Federal Transit Administration, DOT, 400 Seventh St, SW., room 9316, Washington, DC 20590. Telephone 202–366–4011 (voice); 202 366–2979 (TDD). For program issues contact Rhonda M. Crawley, Office of Safety, Federal Transit Administration, DOT, 400 Seventh St, SW., room 6432, Washington, DC 20590. Telephone 202–366–2896. Copies of the regulation are available in alternative formats upon request.

SUPPLEMENTARY INFORMATION:

I. General Notes

A. Name Change

Congress passed reauthorization legislation for several operating administrations of the Department of Transportation (DOT) in the Fall of 1991 (Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. 102–240, December 18, 1991). One important provision involved the name change for the Urban Mass Transportation Administration (UMTA). We are now called the Federal Transit Administration (FTA). In addition, all references to the Urban Mass Transportation Act of 1964 were changed to the Federal Transit Act.

B. How To Read This Proposed Rule

Today's rule, as it affects transit operators, is in three pieces. The document you are reading now contains a proposed part 654, the substantive regulations for alcohol proposed by FTA for recipients of funds under the Federal Transit Act, as amended, and section 103(e)(4) of title 23 of the United States Code. There is a brief explanation of these provisions in the preamble section of this document with emphasis on how these provisions affect, in particular, the transit industry. The text of the substantive regulation we are proposing today for comment follows our preamble.

In addition, however, there is a long discussion of the entire Department of Transportation's efforts in the alcohol testing area in a separate preamble which precedes this document in this issue of the **Federal Register**. This DOT-wide preamble discusses provisions that all of the operating administrations have in common, so it should be read to ensure a complete understanding of today's substantive proposed rule.

Finally, there is a third document, consisting of its own rule and preamble, that contains the technical testing requirements that must be used in conjunction with the part 654 substantive regulations. This third document adds an alcohol subpart to 49 CFR part 40, the Department-wide drug testing procedures rule, and also is published elsewhere in today's issue of the **Federal Register**.

C. Other Related Documents

In addition to the alcohol rules being published today by FTA and several other operating administrations, there are a number of drug testing documents that will also be of interest to transit providers. Accompanying this alcohol NPRM in this separate part is FTA's proposed drug testing rule. The drug proposed rule contains a complete discussion of the issues involved for mandated drug testing. The Omnibus Transportation Employee Testing Act also mandated changes to current DOT testing procedures. Accordingly, in the part 40 proposed rule mentioned above, there are also drug-testing related changes.

Finally, the Department is issuing an advance notice of proposed rulemaking on issues related to random drug testing.

II. Background

On November 22, 1988, the FTA published a final rule requiring certain small and large operators, who were recipients of Federal Transit Act financial assistance, to develop and implement drug testing programs. On December 21, 1989, approximately 200 large transit systems certified compliance with that regulation and began implementing urine drug testing for 5 types of drugs of safety-sensitive employees, including their first line supervisors. Before this date, the FTA had never promulgated any drug or alcohol testing regulations for the transit industry.

On January 19, 1990, the United States Court of Appeals for the District of Columbia announced its decision that FTA did not have sufficient statutory authority to issue an anti-drug regulation on a national basis. (*Amalgamated Transit Union* v. *Skinner*, 894 F.2d 1362 (D.C. Cir. 1990)). Accordingly, on January 25, 1990, FTA published a notice in the **Federal Register** suspending its anti-drug regulation.

At the time of this suspension, the FTA, as well as DOT, indicated its commitment to acquiring the statutory mandate to reinstitute testing for the transit industry. These attempts were successful on October 28, 1991, when HR 2950, the Omnibus Transportation Employee Testing Act, (Pub. L. 102–143) was signed into law by President Bush.

Also in 1991, the FTA Office of Safety conducted a study to determine the extent of drug use in the transit industry. The study's findings, contained in a recently released report, analyze the results of two surveys designed to gather information on substance abuse policies and programs as well as drug and alcohol use patterns in the transit industry. Of the two surveys, one was completed by transit system managers and the other by safety-sensitive transit employees. (See "Substance Abuse in the Transit Industry", Rept. No. DC–90–7021; November, 1991.)

The agency survey sought information on substance abuse program policies and procedures, test results indicating drug or alcohol use during calendar year 1990, disciplinary procedures, employee training, and substance related accident data. The survey was mailed to four hundred transit systems. Three-hundred-six systems comprise the agency data base.

The employee survey was administered to 1,975 safety-sensitive employees at nine randomly selected

transit systems separated into three groups based on annual ridership. The employee questionnaire was focused solely on personal use of drugs and alcohol, and to a large extent, the questions were standardized to facilitate comparison with the National Institute on Drug Abuse (NIDA) Household Survey.

The study was designed to guarantee respondent confidentiality for both the agency and employee surveys. Since both surveys were voluntary, no data were collected from any system or employee who did not consent to participate.

The following are some key findings about alcohol use:

- Of the 306 systems in the data base, 78 percent conduct some type of drug testing and 58 percent conduct alcohol testing. However, when asked which substance was most prevalently abused by the workforce, 75 percent of the agencies identified alcohol.
- The personal use data provided in the 1988 and 1990 NIDA household surveys provide a benchmark for comparisons of the transit industry results with those of the general population. Those results indicate that self-reported alcohol use by transit employees was only slightly lower than reported use by the general population.
- About six percent of the safety-sensitive employees reported using alcohol within five hours before reporting to duty or during duty hours.
- Most of these duty-related drinkers were also high-volume drinkers of six to ten or more drinks each occasion.
- About two percent of alcohol test results confirmed consumption for all safety-sensitive employees.
- The average rate of alcohol tests indicating use for vehicle and equipment maintenance personnel is 3.7 percent, twice that for vehicle operators. Dispatchers also have an alcohol testing rate confirming use which is twice that of vehicle operators.

Based on the study's findings, the statutorily mandated testing for substance abuse is timely and well-founded. This rulemaking should aid in the control of alcohol misuse in the transit industry.

III. The Omnibus Transportation Employee Testing Act of 1991

The Omnibus Transportation Employee Testing Act of 1991 (the Act, title V, Pub. L. 102–143, October 28, 1991) mandates operating administrations within the Department of Transportation, including the FTA, to issue regulations on the misuse of alcohol by safety-sensitive employees. While there is a complete discussion of the various provisions of the Act in the Department-wide preamble found elsewhere in today's issue of the **Federal Register**, the following discussion highlights provisions concerning the FTA.

The Federal Transit Administration must issue regulations requiring recipients of sections 3, 9, and 18 of the Federal Transit Act, as amended, and section 103(e)(4) of title 23 of the United States Code to test safety-sensitive employees for the use of alcohol in violation of law or Federal regulation. The Act allows the FTA to defer to regulations issued by the Federal Highway Administration (FHWA), under the Commercial Motor Vehicle Safety Act of 1986, and the Federal Railroad Administration (FRA), under the Federal Railroad Safety Act of 1970 for operations covered by these statutes.

As a condition of FTA funding, the Act requires recipients to establish an alcohol testing program. The Act mandates four types of testing: pre-employment, reasonable suspicion, random, and post-accident. In addition, the statute permits periodic testing, under various circumstances.

The Act prescribes that certain testing procedures be followed to protect the integrity of the test as well as the privacy of the employee. Recipients performing any of the prescribed tests must promote, to the extent practicable, the individual's privacy while the specimen is being collected.

The Act does not mandate that recipients follow a particular course of action when a safety-sensitive employee has been found to have violated law or Federal regulation concerning the use of alcohol. Instead, the Act directs the FTA to issue regulations setting forth, as it deems appropriate, possible consequences for using alcohol, including education, counseling, rehabilitation programs and possible suspension or termination.

In authorizing this regulatory scheme, the Act has pre-empted all inconsistent State or local laws, rules, regulations, ordinances, standards, or orders. Provisions of State criminal law which impose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property, however, are not pre-empted by the Act.

IV. Previous Action by the Department

On November 2, 1989, the Office of the Secretary of DOT published an Advance Notice of Proposed Rulemaking (ANPRM) to solicit ideas and information about alcohol use and possible future alcohol testing for transportation workers. (54 FR 46326) The ANPRM requested comments on the general question of whether additional Federal measures were necessary to respond to the problem of alcohol misuse among transportation industry employees. If a commenter believed further action was necessary, the ANPRM asked for recommendations whether the further action should be education; enforcement; alcohol testing; and/or state programs. The ANPRM also asked what activity should be prohibited. And, finally, the ANPRM asked what should be the consequences for an employee identified as using alcohol on the job, being under the influence while on the job, or improperly using alcohol before work.

Responses were received from transit authorities; small rural operators; trade unions; state and local governments; medical providers; and a number of individuals. The comments to this ANPRM are discussed in detail in the general preamble published by the DOT Secretary's Office elsewhere in today's issue of the **Federal Register**. What follows is a summary of the comments submitted to the ANPRM that specifically discuss the Federal Transit Administration or its programs.

FTA comments were evenly split for and against any proposed new Federal regulation in the area of alcohol misuse prevention. However, the majority of respondents conceded that a combination of education, testing and rehabilitation, coupled with additional financial assistance from the Federal Government, was necessary to ensure transportation safety.

A. Prohibition

The general consensus among commenters was that alcohol consumption by any safety-sensitive employee should be prohibited while on duty. Two commenters opined that alcohol prohibition should be applied to all employees while on duty or while on company property.

B. Education

Most commenters recommended that the Federal government provide funding for educational programs in alcohol misuse prevention.

C. Testing Method

Commenters expressed concern about the type and cost of implementing an alcohol testing program. Blood tests are perceived as the most accurate and most capable of withstanding legal challenge. However, some consider blood tests to be the most invasive to the individual. Some commenters opined that urine testing would require an observer during the collection process. Since alcohol dissipates much more rapidly in

the body than other drugs, commenters indicated that timing and sample collection are crucial for an accurate reading. Smaller systems raised concerns about the cost of any type of testing.

D. Grounds for Testing

Most commenters recommended employee testing for only reasonable cause or post-accident, that is, when an employee is believed to have consumed alcohol, or where an accident may have been due to alcohol consumption. Commenters further stated that alcohol testing should be for all employees involved directly or indirectly in transportation, including operators, supervisors, mechanics and service personnel.

E. Pre-Duty Abstinence

Comments from both labor and management expressed concern about enforcing behavior of employees off duty. One commenter indicated that local law prohibits the use of alcohol within 6 hours of reporting for work. Another commenter preferred a pre-duty abstinence rule for covered employees similar to the Federal Aviation Administration regulations that prohibit a person from performing under the influence of alcohol, or who has consumed any alcoholic beverage within eight hours of reporting for duty. Another commenter stated that the use of alcohol should be prohibited at least twelve hours before starting work.

F. What is a Positive Test?

Most employers commented that a blood alcohol concentration (BAC) level equal to or greater than .04 can result in immediate termination. One commenter suggested that penalties be more stringent for on-duty drivers and less stringent for other safety-sensitive persons in the transportation industry. One commenter stated that a .04 BAC level "sends a message of permissiveness" and preferred a zero tolerance level.

G. Consequences

Employers indicated that some form of disciplinary action is initiated, including temporary suspension or termination of employment, once a safety-sensitive employee's test indicates alcohol use. Commenters recommended allowing each recipient to establish its own disciplinary rules in accordance with its collective bargaining agreements and its past experience.

H. Rehabilitation

Most commenters stated that rehabilitation programs should be at the option of the employer and not be mandated by the Federal government. Local attitudes, labor/management agreements, and availability of rehabilitation services are some of the factors that may affect treatment policies. In addition, any requirement for employers to pay the cost of rehabilitation or to pay wages for an employee who is not working was strictly opposed. However, one commenter noted that "it is more cost effective to rehabilitate a skilled worker than to hire and train a new one."

V. Overview of Proposed Rule

This notice of proposed rulemaking (NPRM) would apply to recipients of funds under sections 3, 9, and 18 of the Federal Transit Act, as amended, and section 103(e)(4) of title 23 of the United States Code. It requires each transit operator (employer) to establish and conduct a multi-faceted alcohol misuse prevention program. A basic component of the regulation is that FTA operators must test safety-sensitive employees for the use of alcohol. There also must be education about the health and safety problems associated with alcohol misuse.

The regulation specifies that employers may not allow safety-sensitive employees to consume alcohol while performing a safety-sensitive function, for four hours before reporting for duty, or for eight hours following an accident or until an employee has actually been tested for alcohol following an accident, whichever occurs first. The NPRM proposes testing in the following situations:

1. Pre-employment/pre-duty (including transfer to a safety-sensitive position within the organization);
2. Reasonable suspicion;
3. Random;
4. Post-accident; and
5. Return to duty/follow-up.

The NPRM proposes the use of an evidential breath testing device, which has a printed read-out of each test result. The NPRM proposes different consequences, based on the measured alcohol level.

If the alcohol concentration is confirmed at or greater than .02, but less than .04, the covered employee must be removed from his or her safety-sensitive position. In addition, having removed the employee from his or her safety-sensitive function, an employer may elect to send that employee home for a minimum of eight hours or, after some period of time, retest the employee. The employee may not return to work within eight hours of the first test unless the employee's tested alcohol concentration measures less than .02.

If an alcohol test results in a confirmed alcohol concentration at .04 or greater, the covered employee must be removed from his or her safety-sensitive position, be told about educational and rehabilitation programs available, and be evaluated by a substance abuse professional. The proposed rule would allow the employer to require that the employee go through rehabilitation, although the proposed rule would not require the employer to pay for rehabilitation.

Each employer must have a policy statement which sets out its policies and procedures—including consequences—for its alcohol misuse prevention program. The policy also must include details concerning the timeframes during which employees are prohibited from using alcohol.

Finally, the regulation is directed at transit operators and recipients of Federal funds under sections 3, 9, and 18 of the Federal Transit Act, as amended, and section 103(e)(4) of title 23 of the United States Code. Because our statutory mandate directs us to develop regulations for our grantees, there is no language directed at the individual employee. In each case, it is the employer's responsibility to develop a program and implement that program in compliance with these regulations. In some cases this means having responsibility for the actions of its safety-sensitive employees.

VI. Section-by-Section Analysis

As mentioned earlier in this preamble, this section of the document highlights the various sections of the proposed rule, and should be read in conjunction with the Department-wide preamble, which precedes this document in this issue of the Federal Register. Where there is no discussion of a particular provision, there are no FTA-specific provisions or implications about which we seek comment. In these cases, we still ask that commenters direct their comments to the FTA docket on these provisions based on the FTA proposed regulatory text and the discussion of these provisions in the DOT-wide preamble.

Subpart A—General

A. Applicability (§ 654.3)

The FTA proposed rule contains a section specifically describing the applicability of the rule for various grantees under the Federal Transit Act, as amended, and section 103(e)(4) of

title 23 of the United States Code. This is necessary for clarity, since many FTA grantees have portions of their operations regulated by other operating administrations within the Department. In addition, the Act allows FTA to defer to alcohol testing regulations administered by the FRA under the Federal Railroad Safety Act of 1970 or the Federal Highway Administration under the Commercial Motor Vehicle Safety Act of 1986, if the Secretary deems that the operations are adequately covered by these other agencies. The FTA worked with other affected operating administrations of the DOT to reach consensus on which regulation should apply. This section sets out which regulation applies, under which circumstances.

1. *Federal Railroad Administration.* Several of our larger grantees have light or rapid rail subway systems regulated by FTA as well as heavy rail commuter systems, which also are subject to regulations of the Federal Railroad Administration. Section 654.3 states that, for purposes of the alcohol rule, entities or operations of entities currently governed by the FRA under the Federal Railroad Safety Act of 1970 will continue to conduct their alcohol program consistent with the provisions of the FRA regulations. These grantees must certify to the FTA that they are in compliance with the FRA regulations.

2. *Federal Highway Administration.* Grantees with safety-sensitive employees subject to the Commercial Drivers License Program of the FHWA are covered by the FTA alcohol testing program, not that of FHWA. However, drivers employed by FTA grantees, who are holders of Commercial Drivers Licenses, may be subject to other ramifications under the CDL Program. For example, conviction of a crime (*e.g.*, during under the influence) can lead to suspension or revocation of a commercial driver license. Since the FTA has no direct authority over employees, these ramifications would be in addition to those identified in today's proposed part 654.

3. *United States Coast Guard.* The Act does not provide the Secretary the discretion to defer to chemical testing regulations of the United States Coast Guard (Coast Guard) for its marine employers which are also FTA grantees. Further, the Act does not include any mandates affecting the Coast Guard, which already requires alcohol testing in certain circumstances.

In fact, the Coast Guard has a long history of requiring chemical testing (dangerous drugs and alcohol) by marine employers. Equally long is Coast Guard's relationship with individual marine employees, since it is the Coast Guard which issues and revokes a license, certificate, or document of a marine employee.

Thus, FTA grantees which are marine employers are subject to two sets of regulations, those of the Coast Guard found at 46 CFR parts 4 and 16 and 33 CFR part 95 (which are already in effect), and those of the FTA, which will be codified as today's part 654.

In addition, marine employees continue to be subject to Coast Guard regulations at 46 CFR parts 4, 5, and 16 and 33 CFR part 95, even though FTA's regulations do not apply directly to employees. FTA's authority is limited to its relationship with its grantee/employers.

In many cases, the FTA program regulation, as proposed in today's proposed rule, consists of more elements than the Coast Guard regulations affecting marine employers. As a general matter, an FTA grantee generally can rely on the FTA program elements of the regulation to also be in compliance with the Coast Guard regulations.

However, the FTA proposed mandatory testing would use breathalyzers, with testing done consistent with procedures found in 49 CFR part 40. Because the Coast Guard regulations authorizes the use of blood, their regulations include procedures which would not satisfy the requirements of the FTA testing mandates.

As noted earlier, if a grantee/employer complies with the program testing requirements of this part 654, when it becomes final, generally, the grantee also will be in compliance with the employer directed portion of the Coast Guard regulations. To assist in discerning where there may be differences between the two regulations, we have included an example below to show how the regulations are different. In addition, as we discuss specific sections in the Section-By-Section Analysis portion of this preamble, we have highlighted differences in the regulations.

For example, part 5 of the Coast Guard regulations specifies its statutory obligation to revoke a license, certificate or document of any person who has been shown at a hearing to be a user of or addicted to the use of a dangerous drug or to have been convicted of violating a dangerous drug law of the United States.

However, the FTA has no authority over the individual employee. In this example, a marine employer, which is a recipient of Federal Transit Act funds must use the program as set out in part 654. However, there are further responsibilities if the employer is dealing with an employee who has failed a chemical test, including providing specific notice to the Coast Guard of such confirmed alcohol test result. As noted in § 654.3, a grantee is directed to report in writing a test result indicating a concentration level of .04 or greater for an employee holding a license certificate of registry or merchant mariner's document to the nearest Coast Guard Officer in Charge, Marine Inspection (OCMI).

B. Alcohol Testing Procedures (§ 654.5)

This section mandates compliance with the testing procedures for alcohol testing being proposed as 49 CFR part 40 in a separate rulemaking document published elsewhere in today's issue of the **Federal Register** by the Secretary of DOT. The procedures are incorporated by reference into the substantive regulations in part 654, and thus must be complied with in conjunction with part 654.

C. Definitions (§ 654.7)

1. *Accident.* The proposed rule defines accident as an event involving a revenue service vehicle which meets one of four criteria:

(1) It must be reported under regulations of one of three other DOT operating administrations (FRA, FHWA, or Coast Guard);

(2) It results in a loss of human life;

(3) It results in injury requiring transfer to a medical facility; or

(4) It results in property damage with an estimated value of more than $1,000.

The agency is proposing $1,000 to be consistent with the threshold reporting amount of our section 15 reporting requirements. The amount is important in the context of whom must be tested in the "post-accident" setting, as well as who must refrain from using alcohol for a prescribed period of time after an accident.

The agency seeks comment on this provision, and in particular whether there should be more than one threshold amount that would trigger the definition of an accident. For example, there could be different floors based on the type of transit vehicle involved in the accident. For example, $1,000 could be the threshold for a transit van or a bus designated to carry 15 or fewer persons, but another amount—possibly $5,000—could be used for large buses and rail vehicles.

Is there another basis for distinguishing different dollar threshold amounts? What are they? The agency seeks data on this point, including

average accident property damage costs—by vehicle type if possible.

2. *Covered employee.* The proposed rule includes a definition of safety-sensitive functions. Anyone who performs a safety-sensitive function will be subject to the provisions of the rule. As proposed, the FTA defines a covered employee to be any individual who performs a safety-sensitive function, either directly employed by an FTA recipient or as a contractor to an FTA recipient. In this context a contractor need not perform under a formal contract—any ongoing relationship suffices to bestow contractor status.

The inclusion of contract service raised many questions in the suspended 1988 FTA drug testing rule. Several small operators believe including contractors may increase the difficulty of securing maintenance or other service typically provided on a contract-out basis. According to letters we received, many smaller properties use outside sources to conduct basic maintenance for their vehicles. These smaller providers do not believe these gas stations or other providers will agree to the provisions of the drug testing rule.

The FTA believes that, based on (1) Recent findings by Iowa State University in the preparation of a manual on maintenance service contracting and (2) Small operators' actual experiences related to this issue, anticipated compliance difficulties can be resolved satisfactorily.

Further, a colloquy on the floor during debate of our substance abuse testing legislation makes it clear that the sponsors of this legislation intended to include in testing anyone involved in a safety-sensitive position—whether it be a contractor or an employee. ("U.S. Cong. Rec.", S14766, October 16, 1991)

For these reasons, contract personnel who provide service to or work for a recipient in lieu of direct-hire safety-sensitive employees are included in the definition of "covered employee". This concept has been termed "standing in the shoes" of the employer, and as such are covered by the same regulations as the employer and its employees.

The agency seeks comment on this definition, particularly from small systems and those with directly related experiences.

3. *Employer.* The FTA has used the term *employer* to include anyone who is operating transit service, which is subject to this rulemaking. This includes small and large operators, as well as a consortium that may be formed to respond to the needs of several operators. The term *employer* is used instead of recipient to avoid any confusion about who has the responsibility under the rule, since States, which are the direct recipients of some FTA funds, usually do not run transit systems.

4. *Safety-sensitive.* The proposed rule defines safety-sensitive to include any function related to the operation of a revenue service vehicle; controlling the movement or dispatch of a revenue service vehicle; maintaining a revenue service vehicle, or directly supervising any employee performing one of these functions.

The agency is including maintenance functions in this definition, which drew comment in the 1988 drug testing rulemaking context. In response to these comments, FTA sponsored a recent study, "Substance Abuse in the Transit Industry", 1991. This national survey revealed that, for the 176 responding systems testing for alcohol in 1990, the test rate indicating alcohol use among vehicle operators was 1.82 percent; however, the average test rate indicating alcohol use for vehicle and equipment maintenance workers was 3.67 percent.

In addition, of the 1,975 safety-sensitive employees surveyed concerning their personal use of alcohol, six percent reported using alcohol within five hours before reporting to duty or during duty hours. Most of these duty-related drinkers were also high-volume drinkers of six to ten or more drinks per incidence.

Including maintenance functions in the definition of safety sensitive means that these workers also would be subject to post-accident testing. Currently, are maintenance employees tested for alcohol misuse? If yes, under what circumstances? Are maintenance employee attendance records and production reports reviewed for possible signs of alcohol misuse? Also, do we need the concept of "dispatching a vehicle" if the definition includes anyone who controls the movement of the vehicle?

Finally, while this definition includes the functions to be covered, the agency recognizes that each employer will have to make case-by-case determinations for some employees, based on the definition and other guidance material in the final rule.

5. *Small operator.* The definition of small operator in the FTA context is different from other operating administrations publishing proposed rules today. Because of the nature of our program—awarding grants to organizations based on program purpose and demographic size, we have defined a small operator as a recipient which operates in an area less than 200,000 in population. A large operator is defined as a recipient which operates in an area more than 200,000 in population. Other modes are basing the distinction between small and large operators on number of employees.

D. Pre-emption of State and Local Laws (§ 654.9)

The statute calls for Federal pre-emption in the field, voiding the effect of any inconsistent state or local law, ordinance, etc. While there is a complete discussion of this issue in the OST preamble, we would like to highlight this section for FTA readers.

The question of whether the FTA had authority to require grantees to implement a substance abuse program—and what was the effect of that Federal regulation in light of pre-existing inconsistent State provisions—was an impediment to implementing our 1988 drug testing regulation.

Congress included language in the Act indicating that no State (including State Constitutions) or local law continues in effect if it is inconsistent with the FTA alcohol testing regulation. Consistent with longstanding Department-wide interpretation of this type of pre-emption language, the regulation specifies that "inconsistent with" means that the regulation:

(1) Pre-empts a State or local requirement if compliance with the local requirement and the FTA regulation is not possible; or

(2) Pre-empts a State or local requirement if compliance with the local requirement is an obstacle to accomplishing the provisions of the FTA regulation.

On the other hand, the statute and the regulation do not pre-empt State criminal laws that impose sanctions for reckless conduct.

E. Starting Date for Alcohol Testing Programs (§ 654.15)

This section sets out a two-tier approach to mandatory compliance with these alcohol testing rules. For large operators, this section proposes compliance within one year of the final rule. As previously discussed, large operators are those operating in areas of 200,000 or more in population. We propose that small operators must comply within two years of the final rule, which includes operators operating in areas of less than 200,000 in population.

This is one of the few instances where the FTA regulation differs from other operating administration proposed rules. Other NPRM's key compliance to employers with over or under 25 employees. Because of the basic system used to administer the FTA grant program, we did not believe it feasible

to mandate compliance using this criterion. Accordingly, we have keyed the compliance dates to the population size of the area of operation.

F. Compliance a Condition of FTA Financial Assistance (§ 654.17)

The statute requires FTA to establish regulations for an alcohol testing program for recipients of Federal financial assistance under section 3, 9 or 18 of the Federal Transit Act, as amended or section 103(e)(4) of title 23, United States Code. The statute also states that a recipient shall not be eligible for such Federal financial assistance if the recipient fails to establish such a program in accordance with such regulations. Accordingly, continued FTA assistance under these four funding provisions is contingent upon compliance with the FTA substantive alcohol testing regulation, as well as the procedural alcohol testing regulation at part 40.

Paragraph (c) of this section sets out the role for the States in this program. Since the State is the recipient in the case of section 18 funds, and some section 9 funds, it is a "recipient" for purposes of this program. As such, the State has an affirmative obligation to certify compliance to FTA. However, in all cases, this money is funnelled to smaller entities which develop and administer programs consistent with FTA requirements. For purposes of this rule, FTA will require that each State certify compliance on behalf of its subrecipients who are subject to this rule. Each subrecipient must provide adequate assurances to its State so that the State can certify on its behalf.

A small entity will be subject to suspension of funding, through the State, if it is not possible for an appropriate certification to be made on its behalf, or if the FTA has reason to believe that the entity is not in compliance with the regulation in some other material way.

This section also states that any misrepresentation or action to mislead the FTA is a criminal violation under section 1001 of title 18 of the United States Code (see paragraph (b) of the section).

Subpart B—Prohibitions

A. Behavior and Appearance (§ 654.23)

The proposed rule would require an employer to remove an employee from a safety-sensitive function if the employer knows that the employee's behavior or appearance is characteristic of alcohol misuse or his or her ability to perform has been adversely affected by the use of alcohol.

The agency specifically seeks comment on this provision. As proposed, this option would be available to the employer in addition to the reasonable suspicion basis for testing. Are there currently standards such as this in use in the transit industry? Do such standards enhance the effectiveness of an alcohol testing program? Are there problems unique to the transit industry in integrating such a basis for removal into the program?

B. Pre-Duty Use (§ 654.27)

To ensure the safest possible workplace for transit industry employees and the safest possible service for transit system patrons, the FTA is proposing to prohibit employers with knowledge that a covered employee consumed alcohol four hours or less before reporting for duty from allowing that employee to perform or continue to perform a safety-sensitive function.

Because this requirement affects employees' off-duty behavior, the FTA seeks comments on the effect of this provision; transit systems that currently have similar work rules in place are particularly encouraged to provide any relevant information.

In addition, a covered employee who is on-call would have the opportunity to acknowledge the use of alcohol during the preceding four hours, and to take an alcohol test to determine whether or not he or she is able to perform his or her safety-sensitive function.

For a more complete discussion on the issues involved with pre-duty testing please refer to the DOT general preamble.

C. Use Following an Accident (§ 654.29).

The Federal Transit Administration has proposed that in an accident each employer must ensure that the covered employee refrains from alcohol consumption for eight hours following the accident or until a post-accident alcohol test is administered, whichever occurs first.

The agency believes that within eight hours most alcohol will be metabolized from an employee's system, thus making indicative test results problematic. Post-accident testing ensures that the employee has not misused alcohol while performing a safety-sensitive function. The prohibition on use following an accident for a stated period protects the covered employee from the assumption of alcohol misuse that could have contributed to an accident.

In 1991, a motorman whose train derailed killed five persons and injured 200. The motorman left the scene of the accident and subsequent tests showed that the blood of the motorman had an alcohol content twice the legal limit, ten hours after the crash. Prohibiting alcohol consumption following an accident pending the performance of post-accident testing provides liability protection for both the employer and the employee.

FTA solicits comments on this proposed prohibition. Are authorities currently restricting the consumption of alcohol by employees for a stated period between an accident and a post-accident test?

Subpart C—Tests Required

A. Pre-Employment/Pre-Duty (§ 654.41)

This section would require an employer to administer an alcohol test to a covered employee before the employee performs a safety-sensitive function. We anticipate that most employers will require the test as part of pre-employment testing, but seek information about whether this is accurate.

If testing is done at the pre-employment stage, and a new hire does not initially perform safety-sensitive functions, then this section would also require that this employee be given an alcohol test before he or she is transferred to a safety sensitive function.

Also proposed in this section is the employer's discretion to "accept" a test (and therefore not conduct its own preemployment/pre-duty test) if two conditions are met. First, that the employee has had an alcohol test conducted by a DOT agency that comports with the procedural testing requirements of 49 CFR part 40 within the previous six months, indicating an alcohol concentration less than .04; and, second, that the employer ensures that no previous employer of whom he has knowledge has any record of a violation of a DOT agency regulation.

The agency specifically seeks comment on this provision and whether it poses particular problems or solutions for the transit industry.

B. Post-Accident (§ 654.43)

The NPRM proposed post-accident testing for the misuse of alcohol in the case of any mass transit accident involving a loss of human life, or other serious bodily injury or significant property damage.

The FTA has proposed alcohol testing of all surviving safety-sensitive employees present and on duty in the vehicle at the time of the accident or any covered employee involved in the vehicle's most recent maintenance or other safety-sensitive function

preceding the vehicle being placed into revenue service.

The Act specifically requires substance abuse testing in the case of any accident involving the loss of human life. In other cases, the covered employee must be tested unless the employer determines that the employee's performance can be completely discounted as a contributing factor to an accident. Alcohol-misuse related accidents account for a substantial portion of all major accidents within the transit industry. In March 1991, alcohol tests showed that a bus driver was legally drunk two hours after a fatal accident. The driver pulled away from a bus stop, apparently unaware that the front right fender of the bus had struck and killed a pedestrian. Although this was the first fatal accident in that system's history, it demonstrates the need for post-accident testing.

What has been your authority's experience with post-accident testing of employees where there has been a fatality, serious bodily injury or property damage?

The agency specifically solicits statistics or information about accidents, such as the average cost, those involving only vehicle damage, those involving damage to property other than the provider's, human injury, etc.

While not provided for in this FTA proposed rule, Coast Guard regulations for an accident resulting in the death of a covered employee trigger a requirement to test the corpse for chemical substances. The provision is found in Coast Guard regulations at 46 CFR 4.06–30.

C. Retesting of Covered Employees With an Alcohol Concentration of .02 or Greater But Less Than .04 (§ 654.53)

To ensure that employees' rights are adequately protected, and because alcohol is a legal substance, the FTA is considering requiring employers to provide safety-sensitive employees who (1) Confirm at an alcohol concentration of .02 but less than .04 and (2) Are scheduled to perform safety-sensitive functions within eight hours, the opportunity for a retest. If the employee's alcohol level subsequently measures less than .02, or eight hours have elapsed since the confirmation test, the employee would be permitted to perform or continue to perform safety-sensitive functions. Any test conducted before the eight hours has elapsed should be as close as possible to the time the employee would report to work.

Also, the FTA is interested particularly in data on the potential costs of this provision, as well as its impact on productivity and actual operations.

Subpart D—Handling of Test Results, Record Retention, and Confidentiality

Reporting of Results in a Management Information System (§ 654.63)

Elsewhere in today's issue of the **Federal Register** is a DOT-wide procedural rule on alcohol and drug testing. Within this proposed rule, there is a model section on uniform data reporting requirements. While FTA's proposed rule contains the reporting requirements as well, it is the preamble to part 40 which discusses these provisions in detail. Accordingly, those interested especially in this section should read the complete discussion of the provisions in the part 40 preamble.

In commenting on these requirements please indicate either or both docket numbers, as appropriate, if you are responding to specific questions posed in the part 40 preamble, the substantive provisions in proposed part 40 or part 654, or none or all of the above.

Subpart E—Consequences for Employees Engaging in Prohibited Alcohol-Related Conduct

The most important provision in this subpart is the requirement that any safety-sensitive employee who is found to have an alcohol concentration of .02 or greater must be removed immediately from his or her safety-sensitive position. Similarly, if a supervisor has reasonable suspicion that an employee has consumed alcohol, he or she must make a reasonable suspicion finding and refer that employee to testing.

The mandated action when the alcohol content level is between .02 and .04 is that the employee must cease to perform a safety-sensitive function.

If an employee tests at or above .04, that employee must be assessed by a substance abuse professional. The employee must follow the recommendations of the SAP before he or she can return to work and would be subject to the mandatory follow-up tested described elsewhere in this preamble.

In addition, if the employer's policy so states, it is possible that the employee will be required to undergo rehabilitation before returning to a safety-sensitive function, with the approval of the substance abuse professional.

The issue of required rehabilitation, as well as possible suspension or termination are decisions left at the local level.

Subpart F—Alcohol Misuse Information, Training, and Referral

A. Employer Obligation To Promulgate a Policy on the Misuse of Alcohol (§ 654.81)

This section lists all of the elements which must be included in the policy statement developed by the employer and made available to each employee.

This section also notes that an employer may choose to have additional, consistent elements in its alcohol program. This section states that the policies and consequences must clearly describe the fact that they are based on independent authority.

B. Training for Supervisors (§ 654.83)

Training is required for supervisors making reasonable suspicion determinations, which result in alcohol testing. The section specifies that supervisors must receive 60 minutes of such training.

FTA is interested in determining if the proposed rule's training provisions provide enough training and if the provisions are consistent with current training efforts in the industry. For those employers who provide training, how much training do you provide? Is refresher training conducted periodically? Are drug and alcohol training activities combined, or are they separate? Are supervisors and non-supervisory personnel required to participate in substance abuse training? Is any training provided on an optional basis? How much training is provided:

(1) To all personnel;

(2) To personnel making reasonable suspicion determinations?

Data available to the FTA indicate that the success rate of supervisors involved in making reasonable suspicion determinations could be significantly increased with additional training. The agency seeks comment of the possibility of requiring an additional period of time, up to an additional hour, for supervisors making these reasonable suspicion determinations.

In addition, results of a recent internal study indicate that transit personnel who have been distributed educational materials, but not been provided with any inter-active training evidence little benefit from the brochures, etc. We are interested in knowing if any transit property has provided both kinds of education/training and whether there was a perceptible difference in performance, attitude, interpersonal skills or the like.

C. Referral, Evaluation, and Treatment (§ 654.85)

This section proposes that every covered employee who violates a prohibition in subpart B of this part must be evaluated by the employer's substance abuse professional. Part of the evaluation includes being informed about the resources available to deal with problems associated with alcohol misuse.

Concerning rehabilitation, the NPRM does not mandate that an employer provide it to a covered employee. The NPRM would require a covered employee whose alcohol concentration was .04 or greater to be assessed by a substance abuse professional. During this assessment, the substance abuse professional must inform the employee of different assistance that is available. Whether or not there is mandatory rehabilitation, and who pays for rehabilitation are decisions left to the local level. This position was strongly endorsed in the comments submitted on the ANPRM, discussed in an earlier section of this preamble.

Further, this position on rehabilitation is consistent with congressional debate on the topic. In particular, in a colloquy between Senators Danforth and Hollings, the Senators make it clear that rehabilitation is not mandated by the legislation, nor does the legislation specify who should pay for treatment, whether wages must be paid during treatment, or whether there is a right of reinstatement. The colloquy confirms the proposed rule's position that such arrangements can be left to negotiation between the employer and the employee. ("U.S. Cong. Rec.", S14770, October 16, 1991)

The substance abuse professional must also assess the employee to determine that the initial treatment advice was followed before the employee is allowed to return to work. It is this section as well that would require that any employee testing at .04 or greater would be subject to six follow-up tests within the first twelve months of returning to work.

D. Requirement To Certify Compliance (§ 654.87)

The proposed rule states that compliance is a condition of FTA funding and that each recipient must submit an annual certification affirming the establishment and implementation of an alcohol testing program consistent with the rule.

VII. Effect of the Americans With Disabilities Act of 1990 on Alcohol Testing Programs

Title I of the Americans With Disabilities Act of 1990 (ADA) focuses on responsibilities of employers for employees. A basic premise of title I is that a person with a disability must be provided a reasonable accommodation to work. It is possible that some covered workers will be considered persons with disabilities for purposes of protections under the ADA. For a more complete discussion of this issue please see the DOT-wide preamble preceding this FTA document in today's Federal Register.

VIII. Combined Rulemaking

The agency is considering combining the final FTA alcohol and drug testing regulations into one part in the Code of Federal Regulations. The advantage of having both requirements in one part is that the regulations could share common provisions. The disadvantage of having both requirements in one part is that the programs, in many essential ways, will be different, and combining them in one part may be confusing or difficult to understand. If the rules are not issued simultaneously, the integration would occur upon publication of the later-in-time final rule.

The agency seeks comment on the utility of combined provisions.

IX. Regulatory Process Matters

A. Executive Order 12291

The FTA has evaluated the industry costs and benefits of this alcohol testing rule, which requires that transit industry personnel who perform safety sensitive functions be covered by a program to control alcohol misuse in mass transportation operations. The FTA has determined that this rulemaking is not a major rule under Executive order 12291, because the required alcohol testing program is not likely to have costs of over $100 million in any one year.

The materials used in preparing the economic impact estimates for its preliminary regulatory evaluation are based on (1) data on the mass transit industry included in the National Urban Mass Transportation Statistics Section 15 Annual Reports and other reports; (2) data from the 1991 report entitled Substance Abuse in the Transit Industry prepared for the FTA by Booz, Allen & Hamilton, Inc; (3) data provided by the National Institute on Drug Abuse (NIDA); and (4) information gleaned from other agencies and individuals knowledgeable about alcohol misuse and testing in the United States.

Many of the questions raised in today's preamble seek to verify and expand the information the FTA currently has available to it. The preliminary regulatory impact analysis is available for public inspection in the public docket established for this rulemaking.

B. Departmental Significance

This rule is a "significant regulation" as defined by the Department's Regulatory Policies and Procedures, because it involves an important departmental policy and will probably generate a great deal of public interest. The purpose of this rule is to make mass transit systems safer by ensuring that safety sensitive employees do not misuse alcohol in the workplace.

C. Regulatory Flexibility Act

In accordance with 5 U.S.C. 603(a), the Federal Transit Administration has made a preliminary assessment of the possible effects of the rule on small businesses. To the extent possible, the agency has made efforts to acknowledge the differences between small and large entities, and to make accommodations in the rule as possible. At this time, the agency can not say whether there is a significant impact on a substantial number of small entities.

D. Paperwork Reduction Act

This rule includes information collection requirements subject to the Paperwork Reduction Act. A request for Paperwork Reduction Act approval will be submitted to the Office of Management and Budget in conjunction with this rule. Information collection requirements are not effective until Paperwork Act clearance has been received.

E. Executive Order 12612

This action has been reviewed under Executive order 12612, on Federalism. Although the Federal Transit Administration has determined that this action has significant federalism implications to warrant a federalism assessment, this rulemaking is mandated by Congress in the Omnibus Transportation Employee Testing Act of 1991. FTA has limited discretion.

The 1991 legislation mandates the Federal Transit Administration to issue regulations requiring that grantees of section 3, 9, and 18 of the Federal Transit Act of 1964 and 103(e)(4) of title 23 of the United States Code test their safety sensitive employees for the use of alcohol in violation of law or federal regulation.

Before passage of the Omnibus Transportation Employee Testing Act of

1991, safety issues were largely handled as a local matter. This Act makes the Federal role more clear by including specific Federal pre-emption language. This makes it clear that, in the area of substance abuse testing, Federal regulations are to take precedence over any inconsistent local specification.

Although Congress has pre-empted state or local law, the FTA has preserved the local role in mass transit safety. Testing programs created by virtue of a grantee's own authority and which are not inconsistent with this regulation, are not disturbed by this regulation.

F. National Environmental Policy Act

The agency has determined that this regulation has no environmental implications. Its purpose is to regulate the behavior of those safety-sensitive employees who work in the transit industry and will have no appreciable effect on the quality of the environment.

G. Energy Impact Implications

This regulation does not affect the use of energy because it regulates the behavior of those safety sensitive employees who work in the transit industry.

List of Subjects in 49 CFR Part 654

Alcohol testing, Mass transit, Grant programs—transportation, Reporting and recordkeeping requirements, Safety, and Transportation.

Accordingly, for the reasons cited above, the agency proposes to amend title 49 by adding a new part 654, to read as set forth below:

PART 654—PREVENTION OF ALCOHOL MISUSE IN TRANSIT OPERATIONS

Subpart A—General

Sec.

654.1 Purpose.
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654.7 Definitions.
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654.13 Requirement for notice.
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654.21 Alcohol concentration.
654.23 Behavior and appearance.
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654.41 Pre-employment/pre-duty testing.
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654.61 Retention of records.
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Subpart E—Consequences for Employees Engaging in Alcohol-Related Conduct

654.71 Removal from safety-sensitive function.
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Subpart F—Alcohol Misuse Information, Training, and Referral

654.81 Employer obligation to promulgate a policy on the misuse of alcohol.
654.83 Training for supervisors.
654.85 Referral, evaluation, and treatment.
654.87 Requirement to certify compliance.

Appendix to Part 654—Sample Certifications of Compliance

Authority: Sec. 6, Pub. L. 102–143, October 28, 1991; 49 CFR 1.51.

Subpart A—General

§ 654.1 Purpose.

The purpose of this part is to establish programs designed to help prevent accidents and injuries resulting from the misuse of alcohol by employees who perform safety-sensitive functions for employers receiving assistance from the Federal Transit Administration (FTA).

§ 654.3 Applicability.

(a) Except as specifically excluded in paragraph (b) of this section, this part applies to—

(1) Any recipient of Federal financial assistance under section 3, 9, or 18 of the Federal Transit Act, as amended; and

(2) Any recipient of Federal financial assistance under section 103(e)(4) of title 23 of the United States Code.

(b) The specific commuter rail service of an FTA recipient, if this service is subject to alcohol regulations of the Federal Railroad Administration (FRA) (See § 219.3 of this title), is specifically excluded from applicability of this part, except for the certification requirement in § 654.87. (See the appendix to this part for specific certification language.)

(c) An employer with safety-sensitive employees subject to the requirements of the Commercial Drivers License Program or other program administered by the Federal Highway Administration that could subject these employees to alcohol misuse regulations issued by the Federal Highway Administration shall cover these workers under the alcohol program specified in this part 654.

(d)(1) A grantee with marine vessel crew members is subject to chemical testing regulations issued by the U.S. Coast Guard and the alcohol misuse testing program regulations specified in this part 654. Compliance with part 654 may generally be considered compliance with the comparable U.S. Coast Guard provisions in 46 CFR parts 4, 5, and 16.

(2) However, the Coast Guard regulations encompass sanctions and other ramifications for individual marine employees, whereas the FTA regulations apply to and have ramifications for grantees funded under the Federal Transit Act, as amended, and section 103(c)(4) of title 23 of the United States Code. Accordingly, in the case of covered marine employees, there are additional provisions which apply to FTA recipients. The Coast Guard regulations are contained in 33 CFR part 95 and 46 CFR parts 4, 5, and 16.

(3) Nothing in this part prohibits the Coast Guard from directing chemical testing or obtaining test records, as provided for in Coast Guard regulations at 46 CFR parts 4 and 16 and 33 CFR part 95. A grantee shall report in writing to the nearest Coast Guard Officer in Charge, Marine Inspection (OCMI) test results indicating an alcohol concentration of .04 or greater for an individual holding a license, certificate of registry, or merchant mariner's document.

§ 654.5 Alcohol testing procedures.

Each employer shall ensure that all alcohol testing conducted under this part complies with the procedures set forth in part 40 of this title. The provisions of part 40 that address alcohol testing are made applicable to employers by this part.

§ 654.7 Definitions.

As used in this part—

Accident means an occurrence associated with the operation of a revenue service vehicle, whether or not the vehicle is in revenue service, if—

(1) An individual dies or must be taken to a medical treatment facility;

(2) The occurrence results in property damage that is estimated to be more than $1,000; or

(3) The occurrence must be reported to the Federal Highway Administration, the Federal Railroad Administration, or is a reportable incident to the Coast Guard, under applicable regulations.

Administrator means the Administrator of the Federal Transit Administration or the Administrator's designee.

Alcohol means ethyl alcohol (ethanol).

Alcohol concentration (or content) means the alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by an evidential breath test under this part. When the indicated alcohol concentration of a covered employee on an initial alcohol test is different from an indicated alcohol concentration on a confirmatory test, the employee shall be considered to have the lower indicated concentration.

Alcohol use means the consumption of any beverage, mixture, or preparation, including any medication, containing alcohol.

Certification means the written affirmation by an FTA recipient that the recipient has complied with the provisions of this part. A valid certification is a condition of FTA funding and must meet the requirements of this part. Each certification must be authorized by the recipient's governing board or other authorizing official and must be signed by a party specifically authorized to do so. (See § 654.87 for requirements on certification.)

Confirmatory test means a second analytical procedure, separate from the screening test, to determine the concentration of alcohol in a covered employee's system. The confirmatory test may or may not use a different chemical principle from that of the screening test, but shall employ a scientifically recognized method of testing capable of providing quantitative data regarding alcohol concentration. For specific requirements concerning breath analysis testing devices see part 40 of this title.

Consortium means an entity, including a group or association of employers, recipients, subrecipients, or contractors, that provides alcohol testing as required by this part or other DOT alcohol testing rules, and which acts on behalf of the employers.

Covered employee means a person who performs a safety-sensitive function and is (1) Directly employed by an employer or (2) Employed by or contracts with a person or organization that provides service to the employer under contract or other agreement. This definition includes current employees transferring to a safety-sensitive function. For purposes of pre-employment/pre-duty testing only, the term *covered employee* includes a person applying to perform a safety-sensitive function.

DOT means the United States Department of Transportation.

DOT agency means an agency (or "operating administration") of the United States Department of Transportation administering regulations requiring alcohol testing (14 CFR part 61; 49 CFR parts 199, 219, 382, and 654) in accordance with part 40 of this title.

Employer means an entity engaging one or more covered employees that is subject to FTA regulations specifying requirements for an alcohol misuse prevention program. As used in this part, *employer* includes a large operator, a small operator, and any consortium or joint enterprise comprised of two or more employing entities requiring compliance with this part and part 40 of this title.

FTA means the Federal Transit Administration (formerly the Urban Mass Transportation Administration), an agency of the U.S. Department of Transportation.

Initial alcohol test (or screening test) means an analytical procedure to determine whether a covered employee may have a prohibited concentration of alcohol in his or her system.

Large operator means a recipient operating in an area of 200,000 or more in population.

Performing (a safety-sensitive function) means a covered employee is considered to be performing a safety-sensitive function and includes any period in which he or she is actually performing, ready to perform, or immediately available to perform such functions.

Recipient means a grantee of Federal financial assistance of Federal Transit Act funds (including a State) under sections 3, 9, or 18 or under section 103(e)(4) of title 23 of the United States Code.

Refuse to submit (to an alcohol test) means that a covered employee fails to provide adequate breath for testing without a valid medical explanation after he or she has received notice of the requirement to be tested in accordance with the provisions of this part, or engages in conduct that clearly obstructs the collection process.

Revenue service vehicle means a bus, van, car, rail car, locomotive, trolley car, trolley bus, vessel, or vehicle used on a fixed guideway or inclined plane and used to transport passengers.

Safety-sensitive function means any duty related to the safe operation of mass transportation service by an employer, including:

(1) Operating a revenue service vehicle, whether or not the vehicle is in revenue service;

(2) Controlling dispatch or movement of a revenue service vehicle;

(3) Maintaining a revenue service vehicle or equipment used in revenue service; or

(4) Directly supervising an employee who performs a function listed in paragraphs (1) through (3) of this definition.

Small operator means a recipient operating in an area of less than 200,000 in population.

Substance abuse professional means a licensed physician (Medical Doctor or Doctor of Osteopathy), or a licensed or certified psychologist, social worker, or employee assistance professional with knowledge of and clinical experience in the diagnosis and treatment of alcohol-related disorders.

§ 654.9 Pre-emption of State and local laws.

(a) Except as provided in paragraph (b) of this section, this part pre-empts any State or local law, rule, regulation, or order to the extent that:

(1) Compliance with both the State or local requirement and this part is not possible; or

(2) Compliance with the State or local requirement is an obstacle to the accomplishment and execution of any requirement in this part.

(b) This part shall not be construed to pre-empt provisions of State criminal law that impose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property, whether the provisions apply specifically to transportation employees or employers or to the general public.

§ 654.11 Other requirements imposed by employers.

Except as expressly provided in this part, nothing in this part shall be construed to affect the authority of employers, or the rights of employees, with respect to the use or possession of alcohol, including authority and rights with respect to alcohol testing and rehabilitation.

§ 654.13 Requirement for notice.

Before performing an alcohol test under this part, each employer shall notify a covered employee that the alcohol test is required by this part. No employer shall falsely represent that a test is administered under this part.

§ 654.15 Starting date for alcohol testing programs.

(a) *Large employers.* Each recipient operating in an area of 200,000 or more in population on [*effective date of the*

final rule] shall implement the requirements of this part on [*date one year after the effective date of final rule*].

(b) *Small employers.* Each recipient operating in an area of 200,000 or less in population on [*effective date of final rule*] shall implement the requirements of this part on [*date two years after the effective date of final rule*].

(c) All employers shall have an alcohol misuse program that conforms to this part by [*date two years after the effective date of the final rule,*] or by the date the employer begins operations, whichever is later.

§ 654.17 Compliance a condition of FTA financial assistance.

(a) *General requirements.* (1) Compliance with this part is a condition of Federal Transit Administration financial assistance. Failure to certify compliance with these requirements, as specified in § 654.87 will suspend a grantee's eligibility for FTA funding. In addition, if FTA knows, or receives knowledge of, a grantee's noncompliance with the provisions of this part (including a false certification), the grantee becomes ineligible for continued FTA assistance.

(2) As a general matter, in assessing whether or not a recipient is in compliance with this part, the Administrator may determine to act on an isolated instance of violation or on a pattern or practice of noncompliance, at the Administrator's discretion and based on the particular facts of the situation.

(b) *Criminal violation.* A recipient is subject to criminal sanctions and fines for false statements or misrepresentations under § 1001 of title 18 of the United States Code (Crimes and Criminal Procedure).

(c) *State's role.* Each State shall certify compliance on behalf of its section 9 or 18 subrecipients, as applicable, whose grants the State administers. In so certifying, the State shall use due diligence to ensure that each subrecipient is complying with the requirements of this part. A section 9 or 18 subrecipient, through the administering State, is subject to suspension of funding.

Subpart B—Prohibitions

§ 654. 21 Alcohol concentration.

No employer having actual knowledge that a covered employee has an alcohol concentration of .04 or greater shall permit the employee to perform or continue to perform safety-sensitive functions.

§ 654.23 Behavior and appearance.

Notwithstanding the absence of a reasonable suspicion test under § 654.47, no employer having actual knowledge that a covered employee has reported for duty or remains on duty requiring the performance of safety-sensitive functions while the employee's behavior or appearance is characteristic of alcohol misuse or on the employee's ability to perform his or her assigned functions is adversely affected by alcohol use shall permit a covered employee to perform or continue to perform safety-sensitive functions. Each employer shall prohibit a covered employee whose behavior or appearance is characteristic of alcohol misuse or whose ability to perform his or her assigned functions is adversely affected by alcohol from reporting for duty or remaining on duty requiring the performance of safety-sensitive functions.

§ 654.25 On-duty use.

Each employer shall prohibit a covered employee from using alcohol while performing safety-sensitive functions. No employer having actual knowledge that a covered employee is using alcohol while performing safety-sensitive functions shall permit the employee to perform or continue to perform safety-sensitive functions.

§ 654.27 Pre-duty use.

(a) *General.* No employer having actual knowledge that a covered employee has used alcohol within four hours shall permit the employee to perform or continue to perform safety-sensitive functions. No employer having actual knowledge that a covered employee has used alcohol within four hours of performing safety-sensitive functions shall permit a covered employee to perform or continue to perform safety-sensitive functions.

(b) *On-call employees.* The employer shall establish a policy prohibiting the consumption of alcohol for the specified on-call hours of each covered employee who is on-call. At a minimum, the procedure shall ensure that the covered employee who is on call is capable of performing his or her safety-sensitive functions. The procedure shall include:

(1) The opportunity for the covered employee to acknowledge the use of alcohol at the time he or she is called to report to duty and the inability to perform his or her safety-sensitive function.

(2) The requirement that the covered employee take an alcohol test, if the covered employee has acknowledged the use of alcohol, but claims ability to perform his or her safety-sensitive function.

§ 654.29 Use following an accident.

Each employer shall ensure that any covered employee required to take a post-accident alcohol test under § 654.43 refrains from alcohol use for eight hours following the accident or until he or she undergoes a post-accident alcohol test, whichever occurs first.

§ 654.31 Refusal to submit to a required alcohol test.

Each employer shall require a covered employee to submit to a post-accident alcohol test required under § 654.43, a random alcohol test required under § 654.45, a reasonable suspicion alcohol test required under § 654.47, or a follow-up alcohol test required under § 654.51. No employer shall permit an employee who refuses to submit to such a test to perform or continue to perform safety-sensitive functions.

Subpart C—Tests Required

§ 654.41 Pre-employment/pre-duty testing.

(a) Prior to the first time a covered employee performs safety-sensitive functions for an employer, the employer shall ensure that the employee undergoes testing for alcohol. No employer shall allow a covered employee to perform safety-sensitive functions, unless the employee has been administered an alcohol test with a result indicating an alcohol concentration less than .04. If a pre-employment/pre-duty test result under this section indicates an alcohol concentration of .02 or greater but less than .04, the provisions of § 654.75 shall apply.

(b) An employer is not required to administer an alcohol test required by paragraph (a) of this section, if:

(1) The employee has undergone an alcohol test required by this section or the alcohol misuse rule of another DOT agency under part 40 of this title within the previous six months, with a result indicating an alcohol concentration less than .04; and

(2) The employer ensures that no prior employer of the covered employee of whom the employer has knowledge has records of a violation of this subpart or the alcohol misuse rule of another DOT agency within the previous six months.

§ 654.43 Post-accident testing.

(a) In the case of an accident involving the loss of human life, all surviving covered employees on duty and present in the vehicle at the time of the accident or involved in the vehicle's

maintenance or other preparation for revenue service during the time immediately preceding the vehicle being placed into revenue service shall be tested for alcohol.

(b) If there is no loss of human life, and as soon as practicable following the accident, each employer shall test for each surviving covered employee present and on duty in the vehicle at the time of the accident or involved in the vehicle's maintenance or other preparation for revenue service during the time immediately preceding the vehicle being placed into revenue service, if that employee's performance of the safety-sensitive function either contributed to an accident or cannot be completely discounted as a contributing factor to the accident. The decision not to administer a test under this section shall be based on the employer's determination, using the best available information at the time of the determination, that the employee's performance could not have contributed to the accident.

(c) If a test required by this section is not administered within two hours following the accident, the employer shall submit a report to the FTA Office of Safety stating the reasons the test was not promptly administered. If a test required by this section is not administered within eight hours following the accident, the employer shall cease attempts to administer an alcohol test and shall submit the same report. Nothing in this section shall be construed to require the delay of necessary medical attention for injured people following an accident or to prohibit a covered employee from leaving the scene of an accident for the period necessary to obtain assistance in responding to the accident or to obtain necessary emergency medical care.

(d) An employer shall ensure that a surviving covered employee submits to a post-accident test required by this section. A covered employee who is subject to post-accident testing who leaves the scene of the accident without a valid reason prior to submission to such test may be deemed by the employer to have refused to submit to testing.

§ 654.45 Random testing.

(a) Each employer shall, at various times, randomly select covered employees for unannounced alcohol testing. The selection of employees shall be made by use of a scientifically valid method, such as a random-number table or a computer-based random number generator that is matched with employees' Social Security numbers, payroll identification numbers, or other comparable identifying numbers. Each covered employee shall have an equal chance of being tested under the selection process used.

(b) During each 12-month period following the start of random alcohol testing by the employer, the employer shall meet the following conditions:

(1) The dates for administering unannounced testing of randomly-selected covered employees shall be spread reasonably throughout the 12-month period; and

(2) The number of employees randomly selected for testing during the 12-month period shall equal an annual rate of not less than [10–50] percent of the total number of employees subject to alcohol testing under this part or the alcohol misuse rule of another DOT agency. If the employer conducts random testing through a consortium, the annual rate may be calculated for each individual employer or for the total number of covered employees subject to random testing by the consortium.

(c) A covered employee shall only be tested while the employee is performing safety-sensitive functions; just before the employee is to perform safety-sensitive functions; or just after the employee has ceased performing such functions.

(d) Each employer shall require that each covered employee who is notified of selection for random testing proceeds to the testing site immediately. However, if the employee is performing a safety-sensitive function at the time of the notification, the employer shall instead require that the employee ceases to perform the safety-sensitive function and proceed to the testing site as soon as possible.

§ 654.47 Reasonable suspicion testing.

(a) Each employer shall require any covered employee to submit to an alcohol test when the employer has reasonable suspicion to believe that the employee has violated the prohibitions in this part.

(b) The employer's determination that reasonable suspicion exists to require the covered employee to undergo an alcohol test shall be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the employee. The required observations shall be made by a supervisor who is trained in detecting the symptoms of alcohol misuse. The supervisor who makes the determination that reasonable suspicion exists shall not conduct the breath alcohol test on that employee.

(c) Alcohol testing is authorized by this section only if the observations required by paragraph (b) of this section are made during or just preceding the period of the work day that the covered employee is required to be in compliance with this part. A covered employee may be required to undergo reasonable suspicion testing for alcohol while the employee is performing safety-sensitive functions; just before the employee is to perform safety-sensitive functions; or just after the employee has ceased performing such functions.

§ 654.49 Return to duty testing.

Each employer shall ensure that before a covered employee returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited by subpart B of this part, the employee shall undergo a return to duty alcohol test with a result indicating an alcohol concentration of less than .02.

§ 654.51 Follow-up testing.

Following a determination under § 654.85(b) that a covered employee is in need of assistance in resolving problems associated with alcohol misuse, each employer shall ensure that the employee is subject to unannounced follow-up testing as directed by a substance abuse professional in accordance with the provisions of § 654.85(c)(2)(ii).

§ 654.53 Retesting of covered employees with an alcohol concentration of .02 or greater but less than .04.

Each employer shall retest a covered employee to ensure compliance with the provisions of § 654.75, if the employer chooses to permit the employee to perform a safety-sensitive function within 8 hours following the administration of an alcohol test indicating an alcohol concentration of .02 or greater but less than .04.

Subpart D—Handling of Test Results, Record Retention, and Confidentiality

§ 654.61 Retention of records.

(a) *General requirement.* Each employer shall maintain records of its alcohol misuse prevention program as provided in this section. The records shall be maintained in a secure location with controlled access.

(b) *Period of retention.* Each employer shall maintain the records in accordance with the following schedule:

(1) *Five years.* Records of employee alcohol test results with results indicating an alcohol concentration of .02 or greater, documentation of refusals to take required alcohol tests, calibration documentation, and employee evaluation and referrals shall

be maintained for a minimum of five years.

(2) *Two years.* Records related to the collection process (except calibration of EBT's) and training shall be maintained for a minimum of two years.

(3) *One year.* Records of negative test results (as defined in part 40 of this title) shall be maintained for a minimum of one year.

(c) *Types of records.* The following specific records shall be maintained.

(1) Records related to the collection process:

(i) Collection logbooks, if used.

(ii) Documents relating to the random selection process.

(iii) Calibration documentation for evidential breath testing devices.

(iv) Verification of breath alcohol technician training.

(v) Documents generated in connection with decisions to administer reasonable suspicion alcohol tests.

(vi) Documents generated in connection with decisions on post-accident tests.

(vii) Documents verifying existence of a medical explanation of the inability of a covered employee to provide adequate breath for testing.

(2) Records related to test results:

(i) The employer's copy of the alcohol test form, including the results of the test;

(ii) Documents related to the refusal of any covered employee to submit to an alcohol test required by this part.

(iii) Documents presented by a covered employee to dispute the result of an alcohol test administered under this part.

(3) Records related to other violations of this part.

(4) Records related to evaluations:

(i) Records pertaining to a determination by a substance abuse professional concerning a covered employee's need for assistance.

(ii) Records concerning a covered employee's compliance with the recommendations of the substance abuse professional.

(5) Records related to education and training:

(i) Materials on alcohol misuse awareness, including a copy of the employer's policy on alcohol misuse.

(ii) Documentation of compliance with the requirements of § 654.81 of this part.

(iii) Documentation of training provided to supervisors for the purpose of qualifying the supervisors to make a determination concerning the need for alcohol testing based on reasonable suspicion.

(iv) Certification that any training conducted under this part complies with the requirements for such training.

§ 654.63 Reporting of results in a management information system.

(a) Each employer shall submit to the FTA an annual report covering the calendar year, summarizing the results of its alcohol misuse prevention program.

(b) Each employer that is subject to more than one DOT agency alcohol regulation shall identify each employee covered by the regulations of more than one DOT agency. The identification will be by the total number and category of covered function. Prior to conducting any alcohol test on a covered employee subject to the regulations of more than one DOT agency, the employer shall determine which DOT agency regulation or regulations authorizes or requires the test. The test result information shall be directed to the appropriate DOT agency or agencies.

(c) Each employer shall ensure the accuracy and timeliness of each report submitted by the employer or a consortium.

(d) Each employer shall submit the required annual reports no later than February 15 of each year. The report shall be submitted on the form contained in appendix B to part 653 of this title. Each report shall contain:

(1) Number of covered employees by employee category.

(2) Number of covered employees in each category subject to testing under the alcohol misuse regulation of another DOT agency, identified by each agency.

(3)(i) Number of initial tests by type of test and employee category.

(ii) Number of confirmatory tests, by type of test and employee category.

(4) Number of confirmatory alcohol tests indicating an alcohol concentration of .04 or greater, by type of test and employee category.

(5) Number of confirmatory alcohol tests indicating an alcohol concentration of .02 or greater but less than .04.

(6) Number of persons denied a position as a covered employee following a pre-employment/pre-duty alcohol test indicating an alcohol concentration of .04 or greater.

(7) Number of covered employees with a confirmatory alcohol test indicating an alcohol concentration of .04 or greater who were returned to duty in covered positions (having complied with the recommendations of a substance abuse professional as described in §§ 654.73 and 654.85.)

(8) Number of covered employees who were administered alcohol and drug tests at the same time, with both a positive drug test result and an alcohol test result indicating an alcohol concentration of .04 or greater.

(9) Number of covered employees who were found to have violated other provisions of subpart B of this part and the action taken in response to the violation.

(10) Number of covered employees who refused to submit to an alcohol test required under this part, and the action taken in response to the refusal.

(11) Number of supervisors who have received training during the reporting period in determining the existence of reasonable suspicion of alcohol misuse.

§ 654.65 Access to facilities and records.

(a) Except as required by law or expressly authorized or required in this section, no employer shall release covered employee information that is contained in records required to be maintained under § 654.61.

(b) A covered employee is entitled, upon written request, to obtain copies of any records pertaining to the employee's use of alcohol, including any records pertaining to his or her alcohol tests. The employer shall promptly provide the records requested by the employee. Access to an employee's records shall not be contingent upon payment for records other than those specifically requested.

(c) Each employer shall permit access to all facilities utilized in complying with the requirements of this part to the Secretary of Transportation, the U.S. Coast Guard, or other DOT agencies with regulatory authority over the employer or any of its covered employees.

(d) Each employer shall make available copies of all results for employer alcohol testing conducted under this part and any other information pertaining to the employer's alcohol misuse prevention program, when requested by the Secretary of Transportation, the U.S. Coast Guard, or other DOT agencies with regulatory authority over the employer or covered employee.

(e) When requested by the National Transportation Safety Board as part of an accident investigation, employers shall disclose information related to the employer's administration of a post-accident alcohol test administered following the accident under investigation.

(f) Records shall be made available to a subsequent employer upon receipt of written request from the covered employee. Disclosure by the subsequent employer is permitted only as expressly authorized by the terms of the employee's request.

(g) An employer may disclose information required to be maintained under this part pertaining to a covered

employee to the employee or the decisionmaker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the individual, and arising from the results of an alcohol test administered under this part, or from the employer's determination that the employee engaged in conduct prohibited by subpart B of this part (including, but not limited to, a worker's compensation, unemployment compensation, or other proceeding relating to a benefit sought by the employee).

(h) An employer shall release information regarding a covered employee's records as directed by the specific, written consent of the employee authorizing release of the information to an identified person. Release of such information by the person receiving the information is permitted only in accordance with the terms of the employee's consent.

Subpart E—Consequences for Employees Engaging in Alcohol-related Conduct

§ 654.71 Removal from safety-sensitive function.

Except as provided in subpart F of this part, no employer shall permit any covered employee to perform safety-sensitive functions if the employer has determined that the employee has engaged in conduct prohibited by subpart B of this part or an alcohol misuse rule of another DOT agency.

§ 654.73 Required evaluation and testing.

No employer shall permit any covered employee who has engaged in conduct prohibited by subpart B of this part to perform safety-sensitive functions unless the employee has met the requirements of § 654.85. Nothing in this section shall be construed to prohibit the continued performance of safety-sensitive functions necessary to respond to an emergency.

§ 654.75 Other alcohol-related conduct.

(a) No employer shall permit a covered employee tested under the provisions of subpart C of this part who is found to have an alcohol concentration of .02 or greater but less than .04 to perform or continue to perform safety-sensitive functions, until:

(1) The employee's alcohol concentration measures less than .02; or

(2) The start of the employee's next regularly scheduled duty period, but not less than eight hours following administration of the test.

(b) Except as provided in paragraph (a) of this section, no employer shall take any action under this part against an employee based solely on test results showing an alcohol concentration less than .04. This does not prohibit an employer with authority independent of this part from taking any action otherwise consistent with law.

(c) Nothing in this section shall be construed to prohibit the continued performance of safety-sensitive functions necessary to respond to an emergency.

Subpart F—Alcohol Misuse Information, Training, and Referral

§ 654.81 Employer obligation to promulgate a policy on the misuse of alcohol.

(a) *General requirements.* Each employer shall provide educational materials that explain the requirements of this part and the employer's policies and procedures with respect to meeting those requirements. Each employer shall provide written notice to every covered employee and to representatives of employee organizations of the availability of this information.

(b) *Required content.* The materials to be made available to covered employees shall include detailed discussion of at least the following:

(1) The identity of the person designated by the employer to answer employee questions about the materials.

(2) The categories of employees who are subject to the provisions of this part.

(3) Sufficient information about the safety-sensitive functions performed by those employees to make clear what period of the work day the covered employee is required to be in compliance with this part.

(4) Specific information concerning employee conduct that is prohibited by this part.

(5) The circumstances under which a covered employee will be tested for alcohol under this part.

(6) The procedures that will be used to test for the presence of alcohol, protect the employee and the integrity of the breath testing process, safeguard the validity of the test results, and ensure that those results are attributed to the correct employee.

(7) The requirement that a covered employee submit to alcohol tests administered in accordance with this part.

(8) An explanation of what constitutes a refusal to submit to an alcohol test and the attendant consequences.

(9) The consequences for covered employees found to have violated the prohibitions imposed under subpart B, including the requirement that the employee be removed immediately from safety-sensitive functions, and the procedures under § 654.85 of this part.

(10) The consequences for covered employees found to have an alcohol concentration of .02 or greater but less than .04.

(c) *Optional provisions.* The materials supplied to covered employees may also include information on additional employer policies with respect to the use or possession of alcohol, including any consequences for an employee found to have a specified alcohol concentration, that are based on the employer's authority independent of this part. Any such additional policies or consequences shall be clearly and obviously described as being based on independent authority.

§ 654.83 Training for supervisors.

Every employer shall ensure that persons designated to determine whether reasonable suspicion exists to require a covered employee to undergo alcohol testing under § 654.47 receive at least 60 minutes of training on the physical, behavioral, speech, and performance indicators of probable alcohol misuse.

§ 654.85 Referral, evaluation, and treatment.

(a) Each covered employee who has engaged in conduct prohibited by subpart B of this part shall be advised by the employer of the resources available to the employee in evaluating and resolving problems associated with the misuse of alcohol, including the names, addresses, and telephone numbers of substance abuse professionals and counseling and treatment programs.

(b) Each covered employee who engages in conduct prohibited by subpart B shall be evaluated by a substance abuse professional who shall determine what assistance, if any, the employee needs in resolving problems associated with alcohol misuse.

(c)(1) Before a covered employee returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited by subpart B of this part, the employee shall undergo a return to duty alcohol test with a result indicating an alcohol concentration of less than .02.

(2) In addition, each covered employee identified as needing assistance in resolving problems associated with alcohol misuse:

(i) Shall be evaluated by a substance abuse professional to determine that the employee has properly followed any rehabilitation program prescribed under paragraph (b) of this section, and

(ii) Shall be subject to unannounced follow-up alcohol tests administered by the employer following the employee's

return to duty. The number and frequency of such follow-up testing shall be determined by a substance abuse professional, but shall consist of at least six tests in the first 12 months following the employee's return to duty. Follow-up testing shall not exceed 60 months from the date of the employee's return to duty. The substance abuse professional may terminate the requirement for follow-up testing at any time after the first six tests have been administered, if the substance abuse professional determines that such testing is no longer necessary.

(d) Evaluation and rehabilitation may be provided by the employer, by a substance abuse professional under contract with the employer, or by a substance abuse professional not affiliated with the employer. The choice of substance abuse professional and assignment of costs shall be made in accordance with employer/employee agreements and employer policies.

(e) The requirements of this section with respect to referral, evaluation, and rehabilitation, do not apply to applicants who refuse to submit to a pre-employment/pre-duty alcohol test or who have a pre-employment/pre-duty alcohol test with a result indicating an alcohol concentration of .04 or greater.

654.87 Requirement to certify compliance.

(a) Each recipient of FTA financial assistance shall certify annually to the applicable FTA Regional Office compliance with the requirements of this part. Large operators shall certify compliance initially by [DATE 12 MONTHS FROM PUBLICATION OF THE FINAL RULE]. Small operators and States shall certify compliance initially by [DATE 24 MONTHS FROM PUBLICATION OF THE FINAL RULE]. Each certification shall comply with the applicable sample certification provided in the appendix to this part.

(b) Each certification must be authorized by the organization's governing board or other authorizing official. Each certification must be signed by a party specifically authorized to do so. Each certification must comply with the applicable sample certification provided in the appendix to this part.

Appendix to Part 654—Sample Certifications of Compliance

This appendix contains two separate examples of certification language. The first example consists of the generally applicable certification language. Example II should be used by employers who are covered by Federal Railroad Administration's alcohol misuse prevention program regulations.

I.

(a) *For recipients who are large or small operators* I, (name), (title), certify that (name of recipient) and its contractors, as required, for (name of recipient), has established and implemented an alcohol misuse prevention program in accordance with the terms of 49 CFR part 654.

(b) *For States* certifying on behalf of its subrecipients and their contractors, as required, shall be as follows:

I, (name, title) on behalf of (STATE) certify that, to the best of my knowledge and as the result of due diligence, the entities on the attached list of Federal Transit Act subrecipients operating in this State have established and implemented alcohol misuse prevention programs in accordance with the terms of 49 CFR part 654.

II.

The text of the certification of an employer that provides commuter rail transportation service regulated by the Federal Railroad Administration shall be as follows:

I, (name), (title), certify that (name of recipient) and its contractors, as required, for (name of recipient), has an alcohol misuse prevention program that meets the requirements of the Federal Railroad Administration's regulations for employees regulated by the Federal Railroad Administration, and has established and implemented an alcohol misuse prevention program in accordance with the terms of 49 CFR part 654 for all other covered employees who perform safety-sensitive functions.

Issued: December 2, 1992.

Andrew H. Card, Jr.,

Secretary of Transportation.

Brian W. Clymer,

Administrator.

[FR Doc. 92–29685 Filed 12–10–92; 10:00 am]

BILLING CODE 4910–SF–M

Federal Transit Administration

49 CFR Part 653

[Docket No 92–H ; RIN 2132–AA37]

Prevention of Prohibited Drug Use in Transit Operations

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: On October 28, 1991, President Bush signed the Omnibus Transportation Employee Testing Act of 1991, mandating the Federal Transit Administration to issue regulations on drug and alcohol testing for mass transit workers. This document proposes the agency's drug use prevention program, which should increase the safety of mass transit operations.

DATES: Comments on this proposed rule must be submitted by April 14, 1993.

ADDRESSES: Comments should be sent to Docket Clerk, Docket No. 92–H, Federal Transit Administration, DOT, 400 Seventh St. SW., room 9316, Washington DC 20590. Comments will be available for inspection at this address Monday through Friday from 9 a.m. to 5 p.m. If you would like acknowledgment of receipt of your comment please include a stamped, self-addressed postcard with your comment.

FOR FURTHER INFORMATION CONTACT: For program issues, Judy Meade, Office of Safety, Federal Transit Administration, DOT, 400 Seventh St, SW., room 6432, Washington, DC 20590. Telephone: 202–366–2896. For legal questions, Susan Schruth, Office of the Chief Counsel, Federal Transit Administration, DOT, 400 Seventh St, SW., room 9316, Washington, DC 20590. Telephone: 202–366–4011 (voice); 202–366–2979 (TDD). Copies of the regulation are available in alternative formats upon request.

SUPPLEMENTARY INFORMATION:

I. General Note on Change of Agency's Name

Congress passed reauthorization legislation for several operating administrations of the Department of Transportation (DOT) in the Fall of 1991 (The Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. 102–240, December 18, 1991). One important change was the renaming of the Urban Mass Transportation Administration (UMTA), which is now the Federal Transit Administration (FTA). In addition, all references to the Urban Mass Transportation Act of 1964, as amended, were changed to the Federal Transit Act, as amended (FT Act).

II. Background

On November 22, 1988, the FTA issued a final rule requiring recipients of Federal Transit Act financial assistance to develop and implement drug testing programs. This regulation was codified at 49 CFR part 653 and was the first time the FTA had required such a program. On December 21, 1989, approximately 200 large transit systems certified compliance with that regulation and began implementing urine drug testing of safety-sensitive employees (including first-line supervisors) for five types of drugs.

A. Litigation.

Shortly after its final rule was published in 1988, the FTA was sued by three unions representing most American transit workers. In these three suits, consolidated in the United States District Court for the District of

Columbia, the plaintiffs contended that FTA lacked statutory authority to issue a drug testing rule. Plaintiffs also argued that random testing was unconstitutional. Eventually plaintiffs conceded the constitutionality of drug testing, including random testing. After the district court upheld the regulation, the plaintiffs appealed.

On January 19, 1990, the United States Court of Appeals for the District of Columbia Circuit decided that FTA did not have statutory authority to issue an anti-drug regulation. (*Amalgamated Transit Union* v. *Skinner*, 894 F.2d 1362 (D.C. Cir. 1990)). Accordingly, on January 25, 1990, FTA published a notice in the Federal Register suspending its anti-drug regulation. (Today's proposed rule, when finalized, will replace the suspended part 653 with a new part 653.)

In the meantime, other agencies of the Department of Transportation have been sued on a number of different aspects of their respective drug testing regulations, and have prevailed in each case. In those cases, the testing procedures used, the five drugs tested for, the types of tests, including random, as well as the basic constitutionality of drug testing, have been upheld by the courts. Moreover, several transit systems successfully have defended challenges to their own drug and alcohol testing programs.

When FTA's 1988 drug rule was suspended, the FTA and DOT emphasized that statutory drug testing authority for the FTA was a key legislative goal. These attempts were successful on October 28, 1991, when the Omnibus Transportation Employee Testing Act (the Act, Pub. L. 102–143, Title V) was signed into law by President Bush.

Today's proposed rule carries out the mandate in the Act and is similar in many respects to the agency's suspended part 653. However, when today's rule is published in final form the 1988 suspended rule will be removed completely and the only remaining regulation will be that issued under the authority of the Omnibus Transportation Employee Testing Act.

B. Study

In 1991, the FTA Office of Safety conducted a study to determine the extent of substance abuse in the transit industry. ("Substance Abuse in the Transit Industry", DC–90–7021, 1991) The study's findings analyze the results of two surveys designed to gather information on substance abuse policies and programs as well as drug and alcohol use patterns in the transit industry. Of the two surveys, one was completed by transit system managers and the other by safety-sensitive transit employees.

The transit manager survey sought information on substance abuse program policies and procedures, positive test rates during calendar year 1990, disciplinary procedures, employee training, and substance-related accident data. The survey was mailed to 400 transit systems; 306 comprise the agency data base.

The employee survey was administered to 1,975 safety-sensitive employees at nine randomly selected transit systems divided into three groups based on annual ridership. The employee questionnaire was focused solely on personal use of drugs and alcohol and, to a large extent, the questions were standardized to facilitate comparison with the National Institute on Drug Abuse (NIDA) Household Survey.

Both studies guaranteed confidentiality. Since both surveys were voluntary, no data were collected from any system or employee who did not consent to participate.

The following are some key findings from the surveys concerning drug use:

- Of the 306 systems, 78 percent conduct some type of drug testing.
- The personal use data provided in the 1988 and 1990 NIDA household surveys provide a benchmark for comparisons of the transit industry results with those of the general population. Those results indicate that self-reported drug use by transit employees during the twelve months preceding the survey was somewhat lower than self-reported use by the general population. However, self-reported drug use by transit employees during the thirty days preceding the survey was almost identical to that reported by the general population.
- About seven percent of the safety-sensitive employees reported using drugs on the day before or the day of reporting to duty.
- Over ten percent of the safety-sensitive employees reported daily or weekly use of a duty-affecting drug.
- Slightly over four percent of all drug tests administered to safety-sensitive employees and job applicants in 1990 were confirmed positive.
- Positive drug test results were slightly higher for vehicle and equipment maintenance personnel than for vehicle operators.

III. The Omnibus Transportation Employee Testing Act of 1991

The Omnibus Transportation Employee Testing Act of 1991 (the Act) (Pub. L. 102–143, October 28, 1991) requires the FTA to issue regulations mandating testing for the use of certain drugs by safety-sensitive employees. The following highlights provisions of the Act affecting the FTA; see the section-by-section portion of this preamble for a more thorough discussion of the Act.

The Federal Transit Administration must issue regulations requiring recipients of funds under sections 3, 9, and 18 of the Federal Transit Act, as amended, and section 103(e)(4) of title 23 of the United States Code, to test safety-sensitive employees for the use of drugs in violation of law or Federal regulation. The FTA may defer to related regulations issued by the Federal Highway Administration (FHWA), under the Commercial Motor Vehicle Safety Act of 1986, or the Federal Railroad Administration (FRA), under the Federal Railroad Safety Act of 1970, for operations covered by these statutes.

As a condition of FTA funding, the Act requires recipients to establish an anti-drug program. Failure to establish such a program, or to properly carry it out, will result in a suspension of Federal transit funding.

The Act requires urine testing for controlled substances, which the Administrator determines are a risk to transportation safety. A controlled substance is defined in the Act as any substance under section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)). The Act further requires four types of drug testing: Pre-employment, reasonable suspicion, random, and postaccident. In addition, the statute permits periodic testing, under various circumstances.

The Act requires that the Department of Health and Human Services (DHHS) testing procedures be followed to ensure the integrity of the test and to protect the individual's privacy, to the extent practicable, while the specimen is being collected.

The Act does not require recipients to follow a particular course of action when a safety-sensitive employee has been found to have violated law or Federal regulation concerning the use of prohibited substances. Instead, the Act directs the FTA to issue regulations establishing, as it deems appropriate, possible consequences for using a prohibited substance in violation of the FTA regulation, including education, counseling, rehabilitation programs and suspension or termination.

In authorizing this regulatory scheme, the Act pre-empts State or local laws, rules, regulations, ordinances, standards, or orders inconsistent with the regulations issued by the FTA. However, provisions of State criminal

law which impose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property are not pre-empted by the Act.

IV. Overview of Proposed Rule

The proposed rule (NPRM) applies to recipients of funds under sections 3, 9, and 18 of the Federal Transit Act, as amended, and section 103(e)(4) of title 23 of the United States Code. It would require each transit operator (employer) that receives these funds to establish and conduct a multi-faceted anti-drug program. A basic component of the regulation is the testing of safety-sensitive employees for the use of prohibited substances, but education and awareness about the problems associated with prohibited drug use also are required.

The regulation specifies that safety-sensitive employees may not use any of the five prohibited substances identified in the regulation (marijuana, cocaine, opiates, amphetamines, phencyclidine).

The NPRM proposes testing in the following situations:

1. Pre-employment (including transfer to a safety-sensitive position within the organization);
2. Reasonable suspicion;
3. Random;
4. Post-accident; and
5. Return to duty/follow-up (periodic).

The NPRM would require the use of the Department-wide drug testing procedures, contained in part 40 of title 49 of the Code of Federal Regulations. Part 40 is consistent with the DHHS "Scientific and Technical Guidelines for Drug Testing Programs" issued on April 11, 1988. These regulations include specifications on the chain of custody procedures to be used in collecting the sample, procedures for maximizing the privacy of the individual being tested and the like. Each of the existing drug testing programs of other DOT agencies is subject to these part 40 procedures.

If a covered employee fails to pass a drug test (as defined in this part 653), the employee must be removed from his or her safety-sensitive position. In addition, the employee must be told about educational and rehabilitation programs available. Further, the covered employee must be evaluated by a substance abuse professional. The proposed rule would allow the employer to require that the covered employee successfully complete rehabilitation, although the proposed rule would not require the employer to pay for rehabilitation.

Each employer must have a policy statement which describes its anti-drug program policies and procedures, including consequences.

Because the FTA is to issue a regulation requiring a drug testing program as a condition of financial assistance, this regulation applies to recipients of FT Act funds, *i.e.*, transit systems, Metropolitan Planning Organizations, and States, and will be enforced at that level by the FTA rather than at the employee level. (Concerning MPO's and States, they are affected by this regulation if they provide transit service or provide money to a subrecipient who provides transit service and if they currently are required to provide certifications of compliance on behalf of the subrecipient.) MPO's or States that provide transit service will be responsible for developing and implementing a program like any other employer. If an MPO or State does not provide transit service, but manages or funds transit providers, the MPO or State must ensure founded certifications are made to them by employers.

It is the employer's responsibility to develop a program and implement that program in compliance with this regulation. Failure to do so, or to do so properly, will result in a suspension of Federal transit funding.

Finally, a note about terminology. The agency has changed the way it refers to its grantees for purposes of this rulemaking. One principal reason is to use substance abuse language that is uniform among the agencies of the Department of Transportation. The other reason is to more accurately describe the different parties' responsibilities under this regulation.

FTA has its primary relationship with grantees. Many grantees are entities which both receive transit funds and run mass transit services. Typical among these are large transit operators under sections 3 and 9 of the Federal Transit Act, as amended.

In addition, some grantees (typically States) pass the money they receive as grantees to smaller subrecipients within their States. In these cases, the FTA recipient is not the actual transit operator.

To use a phrase which gets at the actual transportation service provider, the NPRM uses the term "employer." This term includes both the small and large operators, as well as those providing service under contract or other arrangement with the transit operator. All of these terms are spelled out in the definitions section and are explained in more detail in the following section-by-section discussion.

V. Section-by-Section Analysis

Subpart A—General

A. Applicability (§ 653.5)

The FTA proposed rule contains a section specifically describing the applicability of the rule to various recipients of funds under the Federal Transit Act, as amended. This is necessary because many FTA recipients have portions of their operations regulated by other agencies of the Department, and the Act allows FTA to defer to anti-drug regulations administered by the FRA under the Federal Railroad Safety Act of 1970, or the FHWA under the Commercial Motor Vehicle Safety Act of 1986, if the Secretary deems that the operations would be adequately covered by these other agencies. This section describes which regulation applies and under which circumstances. In deciding which regulation would apply, the FTA coordinated with the FRA, the FHWA, and the United States Coast Guard. All agencies concur in the following decisions.

1. *Federal Railroad Administration.* In addition to bus and rail operations, several of our larger grantees also have commuter rail operations, which are subject to regulations of the Federal Railroad Administration. Proposed § 653.5 states that, for purposes of the FTA anti-drug rule, entities or operations of entities currently governed by the FRA under the Federal Railroad Safety Act of 1970 will continue to conduct their anti-drug program consistent with the provisions of the FRA regulations. (See § 219.3 of this title.) The grantees must certify to the FTA that they are in compliance with the FRA anti-drug regulations and a proposed model certification is set out in the appendix to part 653.

2. *Federal Highway Administration.* Grantees with safety-sensitive employees subject to the Commercial Drivers License Program of the FHWA are covered by the FTA anti-drug regulation, not that of FHWA.

While FTA grantees can rely on this part 653 to meet FHWA drug testing program requirements, each affected grantee should be aware that individual drivers subject to the Commercial Drivers License requirements may be subject to further sanctions, such as revocation of his or her license, based on a drug conviction.

3. *United States Coast Guard.* The Act does not provide the Secretary the discretion to defer to chemical testing regulations of the United States Coast Guard (Coast Guard) for its marine employers which are also FTA grantees.

Further, the Act does not include any mandates affecting the Coast Guard, which already requires dangerous drug and alcohol testing in certain circumstances.

In fact, the Coast Guard has a long history of requiring chemical testing (dangerous drugs and alcohol) by marine employers. Equally long is Coast Guard's relationship with individual marine employees, since it is the Coast Guard which issues and revokes a license, certificate or document of a marine employee.

Thus, FTA grantees which are marine employers are subject to two sets of regulations, those of the Coast Guard found at 46 CFR parts 4 and 16 and 33 CFR part 95, and those of the FTA, which will be codified as today's part 653. In addition, marine employees continue to be subject to Coast Guard regulations at 46 CFR parts 4, 5, and 16 and 33 CFR part 95, even though FTA's regulations do not apply directly to employees. FTA's authority is limited to its relationship with its grantee/employers.

In many cases, the FTA program regulation, as proposed in today's proposed rule, consists of more elements than the Coast Guard regulations affecting marine employers. While some examples follow later, as a general matter, an FTA grantee generally can rely on the FTA program elements of the regulation to also be in compliance with the Coast Guard regulations.

For both the FTA and the Coast Guard, testing must be done consistent with procedures found in 49 CFR part 40. As mandated by the Act, however, FTA and the Office of the Secretary will propose a change to part 40, mandating a split sample procedure for specimens. When adopted as a provision of part 40 it may not apply to Coast Guard employers. If it does not, this would be an instance in which the procedural provisions of the two agencies' regulations differ.

As noted earlier, if a grantee/employer complies with the program testing requirements of this part 653, when it becomes final, generally, the grantee will also be in compliance with the employer directed portion of the Coast Guard regulations. To assist in discerning where there may be differences between the two regulations, we have included an example below to show how the regulations are different. In addition, as we discuss specific sections in the Section-By-Section Analysis portion of this preamble, we have highlighted differences in the regulations.

For example, part 5 of the Coast Guard regulations specifies its statutory obligation to revoke a license, certificate or document of any person who has been shown at a hearing to be a user of or addicted to the use of a dangerous drug or to have been convicted of violating a dangerous drug law of the United States.

However, the FTA has no authority over the individual employee. The FTA drug rule, as proposed, does allow the employer to terminate an employee based upon a verified positive drug test result.

In this example, a marine employer, which is a recipient of Federal Transit Act funds may use the program as set out in part 653. However, there are further responsibilities if the employer is dealing with an employee who has failed a chemical test for dangerous drugs, including providing specific notice to the Coast Guard of such verified positive drug test result.

B. Definitions (§ 653.7)

1. *Accident.* This definition is important because the regulation would require drug testing after an *accident.* The proposed rule defines accident as an event involving a revenue service vehicle that: must be reported under regulations of any one of three other DOT agencies (FRA, Coast Guard, and FHWA); results in a personal injury that requires removal to a medical facility; results in a loss of human life; or results in property damage with an estimated value of $1,000 or more.

This amount is for all property damage at the scene of the accident. It is not intended to be only damage to the transit vehicle. It could be other vehicle(s), trees, buildings, tunnels, etc. The agency is proposing this property damage floor to be consistent with current Section 15 reporting requirements.

The agency seeks comment on this provision, in particular on whether there should be more than one threshold which would trigger the definition of an accident. For example, there could be different floors based on the type of transit vehicle involved in the accident. For example, the floor might be $1,000 if the transit vehicle involved is a van or other vehicle designed to carry 15 or fewer passengers (including the driver), or $5,000 for an accident involving a rail car or full size bus. Is there another basis for distinguishing different dollar threshold amounts? What are they? The agency seeks data on this point, including average accident property damage costs—by vehicle type if possible.

Post-accident testing is another area in which marine employers must be aware of and comply with additional regulations of the United States Coast Guard. Specifically in this case there are procedures governing testing following a "serious marine incident" and procedures for testing corpses.

2. *Cancelled test.* This definition provides a category of test which is neither a positive or a negative test. In effect, it makes a determination that the test was not conducted. It has important effects, because, among other things, a cancelled test cannot be counted toward meeting the specified random rate.

There are many circumstances in which a test may be "cancelled". For example, the MRO may determine that the results are scientifically insufficient to warrant further action or are suspect because of irregularities in the administration of the test or observation of chain of custody procedures.

A laboratory may refuse to accept a sample caused by a problem with the chain of custody procedures followed, or because of the condition of the specimen. These also would be considered cancelled tests.

For purposes of compliance with this part, there are two types of cancelled tests which would require further testing: Pre-employment and return to duty. Mandating another test in these circumstances follows, since in neither case may an employer place an employee in a safety-sensitive position without the employee passing a drug test. Conversely, another test is not authorized in other cases, since it would serve no purpose: the other tests are situation specific and contingent upon timely testing.

3. *Covered Employee.* This definition is important because it classifies who is subject to the transit operator's drug testing program. The FTA would define a "covered employee" to be any individual who performs a safety-sensitive function, either directly employed by an FTA recipient or subrecipient or under contract to an FTA recipient or subrecipient. The proposed rule includes a definition of specific safety-sensitive functions subject to the provisions of the rule.

As proposed, these duties are related to the safe operation of a vehicle, including operating a revenue service vehicle and maintaining a revenue service vehicle or equipment used in revenue service. The definition of safety-sensitive includes those who supervise directly individuals performing such safety-sensitive functions.

In all cases, a covered employee tested under the authority of this FTA

rule must perform duties which fall within the definition of safety-sensitive.

The definition of covered employee also contains the concept of persons who are not employees of a transit operator, but who perform safety-sensitive functions for the transit operator on a regular or continuing basis. The part also includes a definition of contractor to make it clear that an ongoing relationship suffices to have the definition apply.

The inclusion of non-employee safety sensitive workers in the rule raised many issues during the agency's previous drug testing rulemaking. Many operators, and in particular small operators, contended that covering contract service workers could make it difficult for those transit operators who rely on contract maintenance or other service as their sole method of servicing.

On the other hand, the agency has received information from Iowa State University, that will be released in report form later this year, as well as first-hand experience submitted to the agency by small operators, that indicates that the problem is manageable. Further encouragement for the agency to cover these workers is contained in a colloquy on the Senate floor during debate on the legislation mandating this program in which its sponsors clearly indicate their intent to cover safety-sensitive contract workers as well as direct employees of the grantee. ("Cong. Rec.", S14766, October 16, 1991)

For these reasons, contract personnel who "stand in the shoes" of a recipient's own safety-sensitive employees are included in the definition of *covered employee.*

The agency seeks comment on this definition, particularly from small systems and those with directly related experiences.

4. *Employer.* As proposed, the employer has primary responsibility for developing the requisite drug testing program, including educational materials, policies, and testing processes. The FTA defines "employer" to include anyone who is operating transit service subject to this rulemaking. This includes small and large transit operators, as well as any consortium that may be formed to respond to the needs of several operators. The term "employer" is used instead of recipient to avoid any confusion about who has the responsibility under the rule, since States, which are the direct recipients of some FTA funds, usually do not run transit systems.

Under this NPRM, the original recipient of funds from the FTA must make the drug testing program certification, regardless of whether or not that recipient actually provides transit service. For example, a State is the recipient of funds from the FTA under the section 18 rural program but in most, if not all cases, service is provided by subrecipients spread throughout the State. The State, as the original recipient of FTA funds, would certify to the FTA that each subrecipient complies the drug testing regulation. If for some reason a particular subrecipient fails to establish a drug testing program, or fails to implement a program in accordance with the regulation, the FTA would enforce compliance through the State, by requiring it, for example, to suspend Federal funding to that particular subrecipient unless and until the problem is resolved. The same principle would apply in the case of a transit authority recipient and any subrecipients to which it provided Federal funds.

5. *Large operator.* We have defined a large operator as a recipient which operates in an area of 200,000 or more in population.

6. *Safety-sensitive.* The proposed rule defines safety-sensitive to include any function related to operating a revenue service vehicle; controlling the movement or dispatch of a revenue service vehicle; maintaining a revenue service vehicle; or directly supervising any employee performing one of these functions.

The agency is including maintenance workers in this definition, which drew comment in the 1988 drug testing rulemaking. As noted above, the findings of a recent survey indicate that in 1990 positive drug test results were slightly higher for maintenance employees than for vehicle operators. Including maintenance workers in the definition of safety-sensitive means that these workers also would be subject to post-accident testing.

The agency is interested in whether this provision will increase the number of employees tested by grantees already conducting drug testing. Do you conduct post-accident testing now? Do you currently test maintenance employees for drug use? If yes, under what circumstances? Are maintenance employee attendance records and production reports reviewed for possible signs of drug use?

While this definition includes the functions to be covered, the agency recognizes that each employer will have to make case-by-case determinations in designating which employees are safety sensitive, based on the definition and other guidance material in the final rule.

7. *Small operator.* We have defined a small operator as a recipient which operates in an area of less than 200,000 in population. This distinction is consistent with other FTA programs.

C. Determination of Prohibited Drugs (§ 653.9)

This section lists the five drugs to be tested for and determines that these drugs pose a threat to the safety of mass transit. The definition of prohibited drug in the statute specifically requires the Administrator to make such a finding. These drugs are: Marijuana, cocaine, amphetamines, opiates, and phencyclydine. Other DOT agencies currently test for these "big five" drugs, and they are also the only drugs for which DHHS has certified laboratories to test.

Current data collected by the agency, discussed elsewhere in this preamble, confirm that these five drugs are indeed appropriate for testing under this proposed rule.

D. Pre-Emption of State and Local Laws (§ 653.11)

The statute provides for Federal pre-emption in the field, voiding the effect of any inconsistent State or local law, ordinance, rule, regulation, standard or order.

Whether the FTA had authority to require grantees to implement a substance abuse program, and the effect of that requirement in light of State provisions to the contrary, was at the core of legal challenges to our previous drug testing regulation. Congress included language in the Act indicating that no State (including State Constitutions) or local law continues in effect if it is inconsistent with the FTA drug testing regulation. Consistent with longstanding Department-wide interpretation of this type of pre-emption language, the regulation specifies that "inconsistent with" means that the regulation:

(1) Pre-empts a State or local requirement if compliance with the local requirement and the FTA regulation is not possible; or

(2) Pre-empts a State or local requirement if compliance with the local requirement is an obstacle to accomplishing the provisions of the FTA regulation.

On the other hand, the statute and the regulation do not pre-empt State criminal laws that impose sanctions for reckless conduct.

E. Other Requirements Imposed By An Employer (§ 653.15)

This section makes clear that employers, as well as employees, may

add features beyond those required in this regulation for an anti-drug program. The only limitation is that any such additional features may not conflict or interfere with the implementation of the part 653 provisions. For example, if an employer tests for additional drugs, or for different cut-off levels of the five mandated drugs, the employer would have to conduct a separate urine collection from the covered employee. Nothing could interfere with the Federally-mandated chain of custody procedures.

As indicated in § 654.31, the employer must notify the employee whether a drug test is being conducted under the authority of part 653 or the employer's own authority.

F. Compliance With Testing Procedures Requirements (§ 653.17)

Recipients of FTA assistance must establish an anti-drug program that is consistent with the substantive drug testing requirements of this part 653 as well as the procedural drug testing regulation that has been issued by the Secretary at 49 CFR part 40. FTA recipients must comply with part 40 to be in compliance with part 653.

While each grantee must acquire a copy of the Secretary's part 40 procedural regulation, subpart D of the FTA's substantive regulation contains highlights of the procedural requirements. Further explanation of these requirements can be found in the section-by-section explanation of subpart D portion of this preamble.

G. Compliance as a Condition of FTA Financial Assistance (§ 653.19)

The statute requires FTA to establish a regulation for an anti-drug program for recipients of Federal financial assistance under section 3, 9 or 18 of the Federal Transit Act, as amended, or section 103(e)(4) of title 23, United States Code. The statute also states that a recipient shall not be eligible for such Federal financial assistance if the recipient fails to establish such a program in accordance with such regulations. Accordingly, continued FTA assistance is contingent upon compliance with this drug testing regulation (which includes compliance with 49 CFR part 40).

This section also states that any false misrepresentation or action to mislead FTA is a criminal violation under section 1001 of title 18 of the United States Code.

Paragraph (c) of this section describes the role of the States in this program. Since the State is the recipient in the case of section 18 funds (and may, in some cases, be such for small areas receiving section 9 assistance), it is a "recipient" for purposes of this program. States therefore must certify to FTA compliance with this regulation. However, in most if not all cases, this money is allocated to smaller entities which develop and administer programs consistent with FTA requirements. For purposes of this rule, FTA will require each State to certify compliance on behalf of its subrecipients who are subject to this rule. Each subrecipient must provide adequate assurances to its State so that the State can certify on its behalf.

A small entity will be subject to suspension of funding, through the State, if it is not possible for an appropriate certification to be made on its behalf, or if the FTA has reason to believe that the entity is not in compliance with the regulation in some other material way.

Subpart B—General Program Requirements

This subpart sets out the elements of the anti-drug program each employer must implement to be in compliance with this part.

There are four basic elements to the program: Developing and disseminating a policy statement; employee education and training; testing for five drugs under five different circumstances; and employee suspension, removal, or rehabilitation.

A. Policy Statement Contents (§ 653.23)

The proposed rule would require a policy statement, to be made available to every covered employee, incorporating the employer's position and information on virtually all aspects of the anti-drug testing program. In particular, the policy statement must articulate the employer's position on the following:

1. Specific categories of employees subject to testing.
2. Where to go to for information.
3. When and why an employee will be tested.
4. The consequences of failure to pass a drug test.
5. Program elements in addition to those required by FTA regulation.

The FTA expects each employer to articulate in the policy statement its response concerning a covered employee's failure to pass a drug test. This must include removal of the employee from his or her safety-sensitive position, evaluation of the covered employee, and possible referral for rehabilitation; it could include funding arrangements for rehabilitation (self-pay or employer-paid or some combination). The policy must indicate whether the employer would suspend or terminate a covered employee who has failed to pass a drug test, and the circumstances in which these actions would be taken.

The NPRM would not mandate employer-provided rehabilitation for a covered employee. Further, if the employer provides rehabilitation to a covered employee, the NPRM would not require that the employer pay for it. The NPRM would require a covered employee who fails to pass a drug test to be assessed by a substance abuse professional. During this assessment, the substance abuse professional must inform the covered employee of assistance that is available. While the agency encourages rehabilitation, whether there is mandatory rehabilitation, and who pays for rehabilitation, are decisions left at the local level.

This position on rehabilitation is consistent with congressional debate on the topic. In particular, in a colloquy between Senators Danforth and Hollings, the Senators make it clear that rehabilitation is not mandated by the legislation, nor does the legislation specify who should pay for treatment, whether wages must be paid during treatment, or whether there is a right of reinstatement. The colloquy confirms the proposed rule's position that such arrangements can be left to negotiation between the employer and employee. ("U.S. Cong. Rec.", S14770, October 16, 1991)

Concerning suspension and termination, the proposed rule iterates the statutory requirement but leaves to each employer the responsibility for developing and articulating the consequences of prohibited drug use as defined in the rule. The proposed rule specifies that anyone who fails to pass a drug test (regardless of where or when the substance was ingested) must be removed from his or her safety-sensitive position. This requirement must be included in the policy statement mandated under this section.

B. Education and Training Programs (§ 653.27)

The proposed rule would require that materials providing information about the health and safety consequences of drug use, a hotline telephone number, if available, and the employer's policy on drug use be provided to all covered employees. In addition, the proposed rule would require that employees receive training on personal health and safety issues related to drug use and behavioral cues that may indicate drug use. The purpose of this provision is to raise the consciousness of workers about

drug use and its detrimental effects on the workplace. One of the most effective tools an employer has in fighting drug use is the support and involvement of its employees. Education is the key to making this happen.

In addition to this general training for all covered employees, further training is required for supervisors making reasonable suspicion determinations, which result in drug testing. Paragraph (b)(2) of this section specifies that supervisors must receive 120 minutes of such training. Data available to the FTA indicate that the success rate of supervisors involved in making reasonable suspicion determinations could be significantly increased with more than 60 minutes of training, as required in the agency's previous drug testing rule. For this reason, the agency is proposing 120 minutes of training. However, the FTA has reduced the number of supervisors necessary to make reasonable suspicion referrals from two to one as a result of the industry's expressed concerns about the impracticability of the two supervisor requirement.

FTA is interested in determining if the proposed rule's training provisions provide enough training and if the provisions are consistent with current training efforts in the industry. For those employers who provide training, how much training do you provide? Is refresher training conducted periodically? Are drug and alcohol training activities combined, or are they separate? Are supervisors required to participate in substance abuse training beyond that provided to non-supervisory employees? Is any training provided on an optional basis? How much training is provided:

(1) To all personnel;

(2) To personnel making reasonable suspicion determinations.

C. Drug Testing (§ 653.29)

This section specifies the five drugs to be tested for, as required by the statute, in each employer's program and the different types of tests which must be conducted.

The five drugs are marijuana; cocaine; opiates; amphetamines; and phencyclidine. Required tests, which are the same as the agency required in its previous rule, are: Pre-employment (including transfer to a safety-sensitive position); post-accident; reasonable suspicion, random, and return to duty/followup. The statute specifically lists the first four types of testing, and indicates that the regulation may include "periodic recurring testing", which we have included in the proposed rule as return to duty testing. This type of testing includes the requirement for the employer to test randomly a returning covered employee who has failed to pass a drug test for up to sixty months, based on the recommendation of a substance abuse professional.

The agency is considering a minimum number of return to duty tests, administered randomly, for up to a 60 month period. This provision, if adopted, would require the employer to test the returning employee a minimum number of times—such as four or six—during the first 12 months, independent of any recommendation by the substance abuse professional. The agency seeks comment on this provision, including a minimum number of tests or length of time the covered employee would be mandated to be covered by follow-up testing.

D. Requirement for Specific Notice (§ 653.31)

This section has been added to the rule in response to a concern raised under existing drug programs, and provides that an employer must indicate, before a test is administered, that the urine specimen will be tested for the five prohibited drugs and under what authority the test is being administered, either this Federal regulation or some other basis.

E. Action When Employee Fails to Pass a Drug Test (§ 653.33)

This section states the specific requirement that any safety-sensitive employee who fails to pass or refuses to submit to a drug test must be removed from his or her safety-sensitive function as soon as the employer receives information from the MRO that the covered employee has failed to pass a drug test. In addition to being removed, the employer must ensure that the employee is assessed under the provisions of § 653.35.

This area is an example where there are additional responsibilities for FTA grantees that are marine employers. Consistent with current 46 CFR 16.201(c), an employer or prospective employer of an individual holding a license, certificate of registry or merchant mariner's document who fails to pass a drug test must report the test results in writing to the nearest Coast Guard Officer in Charge, Marine Inspection (OCMI). For further information see 46 CFR part 16

F. Information, Referral, Evaluation, and Treatment (§ 653.35)

Any safety-sensitive employee who fails to pass a drug test must be removed immediately from his or her safety-sensitive position. In addition, the covered employee must be notified of available educational material and organizations providing assistance on substance abuse, and must be assessed by a substance abuse professional. If the employer's policy so states, the covered employee may be required to undergo rehabilitation before returning to a safety-sensitive function.

The substance abuse professional determines when each covered employee who has failed to pass a drug test must be evaluated and which covered employees are ready to return to work.

Subpart C—Types of Drug Testing

A. Pre-Employment/Pre-Duty Testing (§ 653.41)

This section proposes that an employer may not hire an applicant for a safety-sensitive function, unless the applicant passes a drug test that has been administered consistent with the procedures of this regulation.

In addition, any employee who wishes to transfer to a safety-sensitive function from a non-safety-sensitive function is subject to this testing category. Such an employee would not have been subject previously to the drug testing procedures mandated by this part, and consequently must be tested before performing a safety-sensitive function.

For marine employers, 46 CFR 16.210(a) prohibits them from hiring or giving a commitment of employment to an individual unless the individual passes a drug test or meets a stated pre-employment exemption under 46 CFR 16.210(b). (Marine employers which are FTA grantees, however, may not take advantage of the Coast Guard exemption provision and still be in compliance with FTA program regulations in part 653.)

B. Reasonable Suspicion Testing (§ 653.43)

The second type of testing proposed by the NPRM is reasonable suspicion testing. This section proposes that an employer require a covered employee to be tested for prohibited drug use if the employer has a reasonable suspicion that the covered employee has used prohibited drugs. As the section states, the reasonable suspicion determination must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, or speech of the covered employee.

It is this determination for which the proposed rule would mandate 120 minutes of additional training for

supervisors who will be making reasonable suspicion referrals. Unlike the agency's previous anti-drug rule, however, the determination need be made by one supervisor, rather than two. The agency believes that additional training is the key to successful reasonable suspicion testing, not the number of supervisors involved.

The agency seeks information on the application of the reasonable suspicion determination. For example, how many persons are involved currently in making reasonable suspicion determinations? Do fellow workers participate in identifying someone who may be jeopardizing the safety of crew or passengers? If only one supervisor is allowed to make the determination, is corroboration of any kind required? What percentage of persons tested under the reasonable suspicion category fail to pass the drug test?

C. Post-Accident Testing (§ 653.45)

The NPRM proposes post-accident drug testing. An accident is defined as any transit accident involving a loss of human life or other serious bodily injury or significant property damage. (The agency has proposed a floor of $1,000 for property damage, in the context of the definition of accident. Please see the definitions section of the preamble for a more complete discussion of the proposed financial threshold.)

The FTA proposes drug testing of all safety-sensitive employees on duty in the vehicle at the time of the accident or involved in the vehicle's most recent maintenance or other safety-sensitive function preceding the vehicle being placed into revenue service. The Act specifically requires drug testing in the case of any accident involving the loss of human life. In other cases, the covered employee must be tested unless the employer determines that the employee's performance can be completely discounted as a contributing factor to the accident.

The proposed rule requires that the employer ensure that employees required to be tested are tested as soon as possible and within 32 hours of the accident. This is consistent with other DOT agency existing drug testing rules.

This section also requires that the employer consider departure from the scene of the accident as a refusal to submit to a test, unless the covered employee has a valid reason. The agency seeks comment on whether the rule should specify what a valid reason is. Clearly to seek medical attention is, and that is specifically cited in paragraph (d) of this section. However, the covered employee may not need medical attention, but he or she may need to leave the accident to call for help. There may be the risk of explosion or toxic fumes. Should the determination of validity be determined on a case-by-case basis, at the local level, or should the FTA regulation provide some definition of what would be appropriate?

The transit agency survey results, cited earlier in this preamble, indicate that there is a measurable safety problem associated with substance abuse. The survey requested information about major accidents and those with substance abuse as a contributing factor. However, only 50 percent of the transit agency survey respondents could provide such data. Eighteen percent of the respondents who were able to provide information on major accidents reported at least one accident where substance abuse was a contributing factor in 1990.

Almost all systems reporting a substance abuse-related accident conduct both pre-employment and reasonable suspicion testing, and have an above-average likelihood of testing under most other circumstances. However, almost 40 percent of responding transit agencies, are unable to determine whether an accident may be drug or alcohol related.

The FTA seeks the industry's experience with post-accident testing of employees where there has been a fatality, serious bodily injury or property damage.

The agency specifically solicits statistics or information about accidents, such as the average cost, those involving only vehicle damage, those involving damage to property other than the employer's, human injury, etc.

While not provided for in this FTA proposed rule, Coast Guard regulations for an accident resulting in the death of a covered employee trigger a requirement to test the corpse for chemical substances. The provision is found in Coast Guard regulations at 46 CFR 4.06–30.

D. Random Testing (§ 653.47)

The Act requires random drug testing. As in the past, the agency continues to believe that random testing constitutes a significant deterrent to prohibited drug use. A successful antidrug program is a combination of education, awareness and deterrence, which random testing provides.

As described at length in FTA's previous rulemaking on this subject, in random testing covered employees are placed in a pool and, by some identifying number or symbol other than name, are selected using a scientifically valid random selection method. The method used can be a computer model, or a random generation table could be used. Of critical importance, however, is the guarantee that covered employees are chosen in an unannounced and unpredictable manner. It is possible in random generation that one person is chosen two or three times over a period of time, while another person is not chosen at all. However, no covered employee should be removed from the pool merely because he or she has been selected for testing.

The rate at which random testing must be conducted is proposed at the 50 percent rate. A random rate means the percentage of the covered population which must be tested within a given time period (under this regulation, during each calendar year).

The FTA seeks comment on the rate of random drug testing to be conducted. The purpose of random testing is deterrence.

Today's proposed rule uses the 50 percent testing rate in use by the other DOT operating administrations, a rate which has resulted in lower positive rates of tested employees.

While this 50 percent rate has been successful and all operating administrations will continue to use it, the Department—in a separate advance notice of proposed rulemaking (ANPRM) published elsewhere in today's issue of the **Federal Register**—seeks data on other rates that may be appropriate to use, as well as other methodologies or techniques used in conjunction with random testing to enhance the deterrent effect of random testing.

The FTA is participating in and fully supports the Department-wide ANPRM, but we do not anticipate adequate data being available to us by the time we issue a final rule on which to base a decision to vary the random testing rate from the established rate in use by all other DOT operating administrations mandating testing. Persons with data are encouraged to submit comments to both this proposed rule docket and the DOT-wide ANPRM docket.

E. Return to Duty Testing and Follow-Up Testing (§ 653.49)

Once a covered employee fails to pass a drug test, he or she must be evaluated by a substance abuse professional (SAP). One role of the SAP is to evaluate the kind of treatment the covered employee should receive (which may be determined by the range of services made available by the employer), whether the covered employee has followed the recommendations for

action by the SAP, and when the employee is ready to come back to work. Before the covered employee may return to a safety-sensitive position, the covered employee must take and pass a return to duty drug test.

In addition, under the proposed rule, this covered employee would be subject to return to duty random testing for up to 60 months after his or her return to the safety-sensitive position. The amount of time that each employee is subject to follow-up testing may be different, depending on a determination made by the SAP, based on the individual's circumstances.

However, the regulation proposes that a minimum number of six follow-up tests in the first twelve months after returning to duty for any employee who has failed to pass a drug test under this part and who has since passed a return to duty test. This would limit the flexibility of the SAP, but would ensure that every covered employee who has returned to duty is subject to a minimum number of follow-up tests after returning to work. FTA seeks comment on this proposal.

This section is one of the few in which there is a substantive difference between Coast Guard and FTA regulations. FTA has determined that the Coast Guard provision, which requires evaluation by an MRO rather than a SAP, will satisfy the FTA requirement. For further information on the Coast Guard provision see 46 CFR 16.370(d) and part 5.

Subpart D—Drug Testing Procedures

This subpart contains drug testing procedures employers must use that will be detailed in full in a revised part 40. Once part 40 is amended to reflect the provisions of the Act, these sections will be removed from the FTA regulation.

A. Substance Abuse Professional (§ 653.61)

The substance abuse professional (SAP) discussed earlier in the context of return to duty testing, assesses the kinds of information materials, counseling or treatment the covered employee should receive and when the covered employee is capable of returning to his or her safety-sensitive function.

B. Split Sample Procedure (§ 653.63)

This section implements a provision of the Act requiring the employer to allow a covered employee to request a test of a subdivided portion (split) of his or her primary urine specimen, when the result of the test of the primary specimen is confirmed positive. Briefly, the urine specimen is divided at the time of collection, with a minimum specified amount of urine being used for the primary sample and the remainder being poured off to be saved as the split. In all cases, the chain of custody procedures are used for both the primary and the split samples.

Under the terms of this proposed rule, the split sample procedure would consist of three separate steps. First, the MRO would have to verify the test as positive. Second, the MRO would have to contact the employee and give the employee specific notice that the specimen was positive. And, finally, the covered employee would have to indicate in writing that he or she wishes the split sample to be tested.

This request for an analysis of the split would have to be submitted in writing within 72 hours of receiving actual notice from the MRO that the test was a verified positive. The split sample would then be transported to a different DHHS certified lab, which analyzes the split.

As proposed, the 72 hours would be computed as being 72 hours during scheduled work days. Thus, you would skip scheduled vacation time and weekends in the computation of the 72 hours.

The agency seeks comment on the 72-hour notice requirement. This time period is specified in the statute, but FTA is concerned that it does not allow adequate time for the employee to request a test of the split sample. For example, does this provide enough time for an employee to seek and get advice from someone qualified to provide advice? Does it give the employee adequate time to make an informed choice concerning the ramifications of such a test result? In commenting, please provide specific recommendations for a time period and provide reasons for the time period. Those grantees who already operate under other Department agency drug rules could provide comparisons with those drug rules' 60-day allowance for requesting a reanalysis (retest) of the specimen. For those entities providing such an option, what is the average amount of time taken for a request for reanalysis to be submitted? How many requests are submitted within 72 hours? How many take 60 days? Are the circumstances known which required the 60 days?

This section provides that a covered employee may be required to advance the cost of analyzing the split sample, including the cost of transporting the sample to the second lab. If the test result of the split sample is negative, the test is cancelled.

Who pays for the cost of the test if the split sample test result is negative is something that the agency assumes will be determined at the local level.

Subpart E—Administrative Requirements

A. Retention of Records (§ 653.71)

This section explains which records relating to the drug testing program must be retained and for how long.

There are three separate record retention periods—five, two, and one year, for different types of records. The proposed rule would require each employer to maintain for five years records of covered employees' positive drug test results, documentation of refusals to take a drug test, and covered employee referrals to the SAP.

Collection process and employee training documents would be retained for two years, while records of negative test results would be retained for one year. The section specifies these records in detail.

B. Reporting of Results in a Management Information System (§ 653.73)

The proposed reporting requirements are part of a Department-wide effort to standardize its reporting for drug and alcohol testing, by establishing a Management Information System (MIS). The data collected will cover drug testing information, including the types and numbers of employees covered, results and other data, to be used by FTA and DOT to identify trends and to assess the success or failure of the agency's regulatory program.

The data elements will provide a factual base for decisionmaking concerning modifications to our drug testing rule. Information about drug use prevalence, program implementation, and logistical impact will provide a basis for policy review, development, and change, in order to establish the most effective and efficient approach to drug use deterrence and detection. Issues such as scope of applicability, random test rates, rehabilitation, and testing protocols can be more effectively addressed when industry-wide data is available.

The data elements were selected as the minimum necessary to provide information on the scope of the program, drug use and prevalence, program implementation, employer policy and the deterrent effect of the rules over time.

The FTA seeks comment on a number of issues concerning the NPRM's basic data gathering approach. While the proposed rule would require information from all covered employers,

the FTA seeks comment on the merits of seeking information only from a sample of covered employers. The DOT-wide preamble discusses this issue of sampling in greater detail. Or, is reporting an area in which special consideration could be given to very small or very rural operators?

FTA recognizes that any reporting requirement will impose burdens on employers. While these burdens have been analyzed in the regulatory evaluation, we specifically seek comment on ways to achieve the objectives of this requirement with a lesser burden.

Although there are no specific cost elements proposed for the MIS, an ongoing effort of the Department will be to analyze the cost of implementing these regulations. Many of the costs are easily identifiable, such as the charge a transit authority incurs for a laboratory test of a urine specimen. It may be difficult, however, to clearly identify some indirect costs, such as consequential costs of transportation delays caused by the collections. To the extent we might consider seeking cost information from covered transit authorities, are existing accounting systems set up to capture such costs in a manner that would be specific to anti-drug rule compliance? If they were, could we be assured that the different accounting standards that might be used would permit comparison of data from different employers?

Similar questions are raised with respect to benefits. For example, we can determine the specific number of covered employees who have tested positive and been removed from safety-sensitive positions. Although the removal of such covered employees would have safety benefits, will we be able to identify the direct consequences, such as a reduction in accidents? Will we be able to obtain data concerning the indirect benefits, such as improved productivity and decreased absenteeism?

Each report to be submitted would cover a calendar year. The closing date for data would be December 31 and the report would be due at FTA by February 15 of the following year. The transportation employer report would include each of the following data elements. The FTA seeks comments on whether any of these elements should be modified or deleted, or whether any other elements should be added.

1. Number of covered employees by employee category. These data are necessary to assess the scope of the rule's application and to provide a basis for determining if random testing meets the required level.

2. Number of covered employees subject to testing under the anti-drug rules of more than one DOT agency, identified by each agency.

3. Number of specimens collected by type of test (*e.g.*, pre-employment, periodic, random, etc.) and employee category. These data are needed to check the compliance with the rule by category and to review the collection, testing and MRO processes.

4. Number of positives verified by a Medical Review Officer (MRO) by type of test, by type of drug, and employee category. These data, along with the number of tests performed, permit the calculation of positive rates necessary to determine the extent of drug use and the specific drugs detected in the various categories of employees. Further, analysis of these data over time will provide a measure of the effectiveness of the drug testing rules in deterring drug use.

5. Number of negatives verified by an MRO by type of test, and employee category. These data are needed to check compliance with the rules by category and to review the application of the components of the program.

6. Number of persons denied a position as a covered employee following a verified drug test. These data provide an assessment of whether the testing program is being implemented as required, provide a measure of the impact of the drug testing rules on the transit industry, and yield information on the prevalence of drug use in the applicant pool.

7. Number of covered employees verified positive by an MRO, who were returned to duty in covered positions during the reporting period. These data provide information on employer policy implementation regarding return to duty requirements and rehabilitation of identified drug users.

8. Number of employees with tests verified positive by an MRO for multiple drugs. These data provide information on the extent of multiple drug use in the transit industry.

9. Number of covered employees who refused to submit to a drug test required under this part, and the action taken in response to the refusal(s). These data provide information on policy implementation regarding refusals, including subsequent ramifications.

10. Number of covered employees and supervisors who have received required training during the reporting period. These data provide information on training conducted during the current reporting period and a cumulative count of supervisory personnel on the payroll as of December 31 who have received the required drug training.

DOT has developed a standard form for use by employers to provide the data required by this regulation and the FTA-specific form is attached as appendix B to this proposed rule. In addition, FTA is considering authorizing electronic submission of the required report and specifically seeks comment on the desirability or feasibility of this.

We also seek comment on whether these information elements, or the form on which the data would be gathered, are sufficiently clear for use by employers, particularly small transit systems. If not, we encourage comments on ways to make the form and information elements easier to use.

Many small covered employers will participate in the drug testing program through consortia. We seek comment on the extent to which the use of consortia may mitigate any problems that smaller employers have in dealing with the reporting requirement.

FTA also seeks comment on an approach taken by other DOT agencies in their 1988 final rules regarding plan submissions. That is, all "large" employers (for other operating administrations this is based on a minimum number of employees of 15. For the FTA, a large employer would be one operating in an area with a population of 200,000 or more) would report additional data needed for program evaluation purposes during the first year. A staged or short-form type of reporting (including perhaps a sampling of smaller employers) would apply after the first year for "small" employers (for other operating administrations this is based on a maximum number of employees of 15. For the FTA, a small employer would be one operating in an area with a population less than 200,000). Again, comments are particularly invited on how such an approach could serve the Department program evaluation needs while providing data essential for enforcement purposes.

C. Availability and Disclosure of Information (§ 653.75)

This section would establish the boundaries for allowing information to be released about a covered employee's drug test results. As with the procedural aspects of the rule, we have made every effort to maximize the privacy of the individual employee. Accordingly, this section describes the circumstances under which an MRO could release information concerning an employee and the result of any test conducted under the auspices of this part.

D. Requirement to Certify Compliance (§ 653.77)

The proposed rule states that compliance is a condition of FTA funding and that each recipient must submit an annual certification affirming the establishment and implementation of a drug testing program consistent with the rule.

VI. Implementation Period

agency is considering different implementation periods for small and large entities, in recognition of the increased difficulties small operators may face in implementing their programs. In many cases, small operators will need to develop consortia or other sharing arrangements to implement the rule in a cost-effective manner.

Because of the time FTA recipients have had to prepare for this regulation, however, extended implementation periods should be unnecessary. Accordingly, we expect to require large operators to certify compliance with the final rule between three and six months from publication of the final rule and to require States and small operators to certify compliance within six months to one year of publication of the final rule. We seek comment on these proposed periods.

VII. Americans With Disabilities Act of 1990

Title I of the Americans With Disabilities Act of 1990 (ADA) prohibits discrimination on the basis of disability in employment. Employers may not discriminate against a "qualified individual with a disability" and must make "reasonable accommodation" to permit qualified individuals with disabilities to work. Under the ADA, a "qualified individual with a disability" does not include an employee or applicant who is "currently engaging in the illegal use of drugs." This exclusion from the protection of the ADA applies only to users of controlled substances, not to users of alcohol.

There are a number of things employers may do concerning drug and alcohol use without violating the ADA. They may prohibit the illegal use of drugs and the use of alcohol at the workplace (e.g., drinking on the job). They may require that employees not be under the influence of alcohol at the workplace. They may require employees to conform to the requirements of the Drug-Free Workplace Act. They may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards as other employees, even if unsatisfactory performance relates to drug use or alcoholism (for example, if an employer has a policy of firing employees who are late five times in a month, the employer can fire such an employee even if the tardiness results from alcoholism). The employer may require employees to conform to the standards established in the FTA Alcohol Misuse Prevention Program Regulations.

The ADA specifically provides that entities subject to DOT jurisdiction are not prohibited from testing employees in, and applicants for, safety-sensitive positions "for the illegal use of drugs and for on-duty impairment by alcohol." These employers also do not violate the ADA if they remove persons from safety-sensitive positions whose alcohol test indicates a prohibited alcohol concentration.

Someone who currently is engaged in the illegal use of drugs (and an employee who fails a drug test falls into this category) is not a "qualified individual with a disability". This means that even if the individual is a drug addict (drug addiction being a disability), the employer has the discretion to fire him or her, and need not provide reasonable accommodation to the disability.

On the other hand, if the individual misuses alcohol, and the individual is an alcoholic (alcoholism being a disability), the individual remains a qualified individual with a disability, to whom the employer must provide reasonable accommodation. This may mean, for example, that the employer could be required to refrain from firing the individual pending the opportunity for rehabilitation. This situation exists only if the person has a disability (*i.e.*, is an alcoholic). Someone who tests at or above the prohibited level on the basis of some ill-timed casual drinking, but who is not an alcoholic, is not protected by the ADA, since such an individual does not have a disability.

VIII. Combined Rulemaking

The agency is considering combining the final FTA alcohol and drug testing regulations into one part in the Code of Federal Regulations. The advantage of having both requirements in one part is that the regulations could share common provisions. The disadvantage of having both requirements in one part is that the programs, in many essential ways, will be different, and combining them in one part may be confusing or difficult to understand. If the rules are not issued simultaneously, the integration would occur upon publication of the later-in-time final rule.

The agency seeks comments on the utility of combined provisions.

IX. Regulatory Process Matters

A. Executive Order 12291

The FTA has evaluated the industry costs and benefits of this drug testing rule, requiring that transit industry personnel performing safety-sensitive functions be covered by a program to prevent drug use in mass transit operations. The FTA has determined that this rulemaking is not a major rule under Executive order 12291 because the required anti-drug program is not likely to have costs of over $100 million in any one year.

The materials used in preparing the economic impact estimates for this preliminary regulatory evaluation are based on (1) Data on the mass transit industry included in the National Urban Mass Transportation Statistics Section 15 Annual Reports and other reports; (2) Data from the 1991 report entitled "Substance Abuse in the Transit Industry" prepared for the FTA by Booz, Allen & Hamilton, Inc.; (3) Data provided the National Institute on Drug Abuse (NIDA); and (4) Information gleaned from other agencies and individuals knowledgeable about drug testing in the United States. Many of the questions raised in today's preamble seek to verify and expand the information the agency currently has available to it. The preliminary regulatory impact analysis is available for public inspection in the public docket established for this rulemaking.

B. Departmental Significance

This rule is a "significant regulation" as defined by the Department's Regulatory Policies and Procedures, because it involves an important departmental policy and will probably generate a great deal of public interest. The purpose of this rule is to make mass transit systems safer by ensuring that safety-sensitive employees do not use prohibited substances.

C. Regulatory Flexibility Act

In accordance with 5 U.S.C. 603(a), the Federal Transit Administration has made a preliminary assessment of the possible effects of the rule on small business. To the extent possible, the agency recognized the differences between small and large entities, and made as many accommodations in the rule as possible. At this time, the agency cannot say whether there is a significant impact on a substantial number of small entities.

D. Paperwork Reduction Act

This rule includes information collection requirements subject to the Paperwork Reduction Act. A request for Paperwork Reduction Act approval will be submitted to the Office of Management and Budget in conjunction with this rule. Information collection requirements are not effective until Paperwork Reduction Act clearance has been received.

E. Executive Order 12612

This action has been reviewed under Executive Order 12612, on federalism. Although the Federal Transit Administration has determined that this action has significant federalism implications to warrant a federalism assessment, this rulemaking is mandated by Congress in the Omnibus Transportation Employee Testing Act of 1991.

Under the 1991 legislation, the Federal Transit Administration is to issue regulations requiring that recipients of funds under sections 3, 9, and 18 of the Federal Transit Act, as amended, and 103(e)(4) of title 23 of the United States Code, test their safety-sensitive employees for the use of certain prohibited substances in violation of law or Federal regulation.

Before passage of the Omnibus Transportation Employee Testing Act of 1991, safety issues were largely handled as a local matter. This Act clarifies the Federal role by including specific Federal pre-emption language. In the area of drug testing, Federal regulations take precedence over any local specification.

Although Congress has pre-empted inconsistent State or local law, the FTA has preserved the local role in mass transit safety. Testing programs created by virtue of a grantee's own authority are not disturbed by this regulation, so long as they do not impede compliance with the Federal program.

F. National Environmental Policy Act

The agency has determined that this regulation has no environmental implications. Its purpose is to regulate the behavior of those safety-sensitive employees who work in the transit industry and will have no appreciable effect on the quality of the environment.

G. Energy Impact Implications

This regulation does not affect the use of energy because it regulates the behavior of those safety-sensitive employees who work in the transit industry.

List of Subjects in Part 653

Drug testing, Grant programs—transportation, Mass transportation, Reporting and recordkeeping requirements, Safety, Transportation.

Accordingly, for the reasons cited above, the agency proposes to amend title 49 by deleting the suspended part 653 and adding a new part 653, as set forth below:

PART 653—PREVENTION OF PROHIBITED DRUG USE IN TRANSIT OPERATIONS

Subpart A—General

Sec.

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Subpart C—Types of Drug Testing

653.41 Pre-employment/pre-duty testing.
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653.61 Substance abuse professional.
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Appendix A to Part 653—Certifications of compliance

Appendix B to Part 653—Drug and Alcohol Testing Management Information System Data Collection Form

Authority: Sec. 6, Public Law 102–143, 105 Stat. 917; 49 CFR 1.51.

Subpart A—General

§ 653.1 Overview.

(a) This part describes the drug testing requirements to be followed by recipients of funds under the Federal Transit Act, as amended. The part contains all substantive requirements concerning the types of drugs to be tested for, the types of tests to be conducted, and general legal and administrative ramifications of the program. The testing procedures for this program are contained in a Department-wide regulation in part 40 of this title.

(b) The part contains five subparts, with subpart A containing the general, overarching requirements for the FTA drug program. Subpart B specifies the basic requirements of each employer's drug program, including the types of tests to be conducted, the elements required to be in each employer's drug testing program, and options concerning rehabilitation. Subpart C discusses in detail the different types of drug tests which must be conducted. Subpart D discusses two new drug testing procedural requirements, mandated by the Act. Finally, subpart E contains administrative requirements, such as certification of compliance and the employer requirement to report to FTA, and the contents of these reports.

§ 653.3 Purpose.

This part requires a recipient of Federal Transit Administration financial assistance to have an anti-drug program that is designed to detect the use of prohibited drugs by safety-sensitive employees and to deter safety-sensitive employees from using prohibited drugs.

§ 653.5 Applicability.

(a) Except as specifically excluded in paragraph (b) of this section, this part applies to—

(1) Any recipient of Federal financial assistance under sections 3, 9, or 18 of the Federal Transit Act, as amended; and

(2) Any recipient of Federal financial assistance under section 103(e)(4) of title 23 of the United States Code.

(b) The specific commuter rail service operations of FTA recipients, if these services are subject to anti-drug regulations of the Federal Railroad Administration (FRA) (see § 219.3 of this title), are excluded from applicability of this part, except § 653.77. This section sets out the certification of compliance procedure. A recipient covered by paragraph (b) of this section will be deemed to meet the substantive requirements of this part if the certification states that specified operations comply with FRA

regulations. See appendix A to this part for specific certification language.

(c) An employer with safety-sensitive employees subject to the requirements of the Commercial Drivers License Program or other program administered by the Federal Highway Administration that could subject these employees to anti-drug regulations issued by the Federal Highway Administration shall cover these workers under the program specified in this part 653.

(d)(1) A grantee with marine vessel crew members is subject to chemical testing regulations issued by the U.S. Coast Guard and the drug testing program regulations specified in this part 653. Compliance with part 653 may generally be considered compliance with the comparable U.S. Coast Guard provisions in 46 CFR parts 4, 5, and 16.

(2) However, the Coast Guard regulations encompass sanctions and other ramifications for individual marine employees, whereas the FTA regulations apply to and have ramifications for grantees of Federal Transit Act funds. Accordingly, in the case of covered marine employees, there are additional provisions which apply to FTA recipients. The Coast Guard regulations are contained in 33 CFR part 95 and 46 CFR parts 4, 5, and 16.

(3) Nothing in this part prohibits the Coast Guard from directing chemical testing or obtaining test records, as provided for in Coast Guard regulations at 46 CFR parts 4 and 16 and 33 CFR part 95.

§ 653.7 Definitions.

As used in this part—

Accident means an occurrence associated with the operation of a revenue service vehicle, whether or not such vehicle is in revenue service, if—

(1) An individual dies or must be taken to a medical treatment facility;

(2) The occurrence results in total property damage at the accident site estimated at more than $1,000; or

(3) The occurrence must be reported to the Federal Highway Administration, the Federal Railroad Administration, or is a serious marine incident to the U.S. Coast Guard, under applicable regulations.

Administrator means the Administrator of the Federal Transit Administration or the Administrator's designee.

Anti-drug program means a program to prevent the use of prohibited drugs as required by this part.

Cancelled test means a test which has been declared invalid. It is neither a positive nor a negative test. This term includes a specimen which is rejected for testing by a laboratory.

Certification means the written affirmation by an FTA recipient, authorized by the organization's governing board or other authorizing official, that the recipient has complied with the provisions of this part. A valid certification is a condition of FTA funding and must meet the requirements of this part. (See § 653.77 for requirements on certification.)

Chain-of-custody procedures means the procedures in part 40 of this title concerning the handling of a urine sample.

Consortium means a group or association of transit operators, recipients, subrecipients, or contractors which provides drug testing as required by this part, and which acts on behalf of the employers.

Contractor means a person or organization who provides service to or works for the recipient or subrecipient, consistent with a specific understanding or arrangement. The understanding can be a written contract or an informal arrangement, which reflects an ongoing relationship between the parties.

Covered employee means a person who performs a safety-sensitive function and is (1) Directly employed by an employer or (2) Employed by or contracts with a person or organization that provides services to the employer under contract or other agreement. This definition includes applicants to perform these functions.

DOT means the United States Department of Transportation.

DOT agency means an agency (or "operating administration") of the United States Department of Transportation administering regulations requiring drug testing (see parts 199, 219, 382, and 653 of this title, 14 CFR part 121, appendix J, 33 CFR part 95, and 46 CFR parts 4 and 16).

Employer means an entity engaging one or more covered employees that is subject to DOT agency regulations specifying requirements for an anti-drug control program. As used in this part *employer* includes a large operator, a small operator, and any consortium or joint enterprise comprised of two or more employing entities requiring compliance with this part or part 40 of this title.

FTA means the Federal Transit Administration (formerly the Urban Mass Transportation Administration), an agency of the U.S. Department of Transportation.

Large operator means a recipient or subrecipient operating in an area of 200,000 or more in population.

Medical Review Officer (MRO) means a licensed physician responsible for receiving laboratory results generated by an employer's drug testing program who has knowledge of substance abuse disorders and has appropriate medical training to interpret and evaluate an individual's confirmed positive test result together with his or her medical history and any other relevant biomedical information.

Pass a drug test means that a medical review officer has determined, in accordance with part 40 of this title, that the results of a drug test administered under this part—

(1) Showed no evidence or insufficient evidence of a prohibited drug or drug metabolite; or

(2) Showed evidence of a prohibited drug or drug metabolite, but there was a legitimate explanation for the result;

Prohibited drug means a substance under section 102(6) of the Controlled Substances Act, 21 U.S.C. 802(6) and which the Administrator has listed in § 653.9 as being a risk to transportation safety.

Recipient means a grantee of Federal financial assistance of FT Act funds (including a State) under sections 3, 9, or 18, or under section 103(e)(4) of title 23 of the United States Code.

Refuse to submit means the nonproduction of a urine specimen as required by this part. Refusal can include an unsubstantiated inability to provide a specimen as well as a verbal declination or physical absence resulting in the inability to conduct the test.

Revenue service vehicle means a bus, van, car, rail car, locomotive, trolley car, trolley bus, vessel, or vehicle used on a fixed guideway or inclined plane used to transport passengers.

Safety-sensitive function means any duty related to the safe operation of mass transit service by an employer, including:

(1) Operating a revenue service vehicle, whether or not the vehicle is in revenue service;

(2) Controlling dispatch or movement of a revenue service vehicle;

(3) Maintaining a revenue service vehicle or equipment used in revenue service; or

(4) Directly supervising an employee who performs a function listed in paragraphs (1) through (3) of this definition.

Small operator means a recipient or subrecipient operating in an area of less than 200,000 in population.

Substance abuse professional (SAP) means a licensed physician, licensed or certified psychologist, social worker, or employee assistance professional with knowledge of and clinical experience in the diagnosis and treatment of drug-related disorders.

§ 653.9 Determination of prohibited drugs.

Consistent with the requirements of the Omnibus Transportation Employee Testing Act of 1991, the Administrator has determined that the following drugs are prohibited drugs, since they pose a risk to transportation safety: (a) Marijuana; (b) Cocaine; (c) Opiates; (d) Amphetamines; and (e) Phencyclidine.

§ 653.11 Pre-emption of State and local laws.

(a) Except as provided in paragraph (b) of this section, this part pre-empts any State or local law, rule, regulation, order, or standard to the extent that:

(1) Compliance with both the State or local requirement and any requirement in this part is not possible; or

(2) Compliance with the State or local requirement is an obstacle to the accomplishment and execution of any requirement in this part.

(b) This part shall not be construed to preempt provisions of State criminal law that impose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property, whether the provisions apply specifically to transportation employees or employers or to the general public.

§ 653.13 Requirement to establish an anti-drug program.

Each employer shall establish an anti-drug program consistent with the requirements of this part. Consistent with § 653.77, each recipient shall certify to the FTA that it, its contractor, or subrecipient (whoever is providing mass transit services or portions of mass transit service with Federal Transit Act assistance) has established and implemented an anti-drug program as prescribed by this part.

§ 653.15 Other requirements imposed by an employer.

Except as expressly provided in this part, nothing in this part shall be construed to affect the authority of an employer, or the rights of employees, to negotiate or provide for additional or more stringent elements of an anti-drug program, so long as the program is not inconsistent with or frustrates the implementation of any provision of this part.

§ 653.17 Compliance with testing procedures requirements.

Each employer shall ensure that all drug testing conducted under this part complies with the procedures set forth in part 40 of this title. The drug testing provisions of part 40 of this title apply to employers covered by this part.

§ 653.19 Compliance a condition of FTA financial assistance.

(a) *General.* (1) Compliance with this part is a condition of Federal financial assistance under the Federal Transit Act, as amended, and section 103(e)(4) of title 23 of the United States Code. Failure to certify compliance with these requirements, as specified in § 653.77, will result in the suspension of a grantee's eligibility for Federal funding. In addition, if FTA knows, or receives knowledge of, a grantee's noncompliance with the provisions of this part (including a false certification), the grantee becomes ineligible for continued FTA assistance.

(2) As a general matter, in assessing whether or not a recipient is in compliance with this part, the Administrator may determine to act on an isolated instance of violation or on a pattern or practice of noncompliance, at the Administrator's discretion and based on the particular facts of the situation.

(b) *Criminal violation.* A recipient also is subject to criminal sanctions and fines for false statements or misrepresentations under § 1001 of title 18 of the United States Code (Crimes and Criminal Procedure).

(c) *State's role.* Each State shall certify compliance on behalf of its section 3, 9 or 18 subrecipients, as applicable, whose grant the State administers. In so certifying, the State shall use due diligence to ensure that each subrecipient is complying with the requirements of this part. A section 3, 9 or 18 subrecipient, through the administering State, is subject to suspension of funding from the State.

Subpart B—General Program Requirements

§ 653.21 Required elements of an anti-drug testing program.

At a minimum, an anti-drug program shall consist of the following:

(a) A policy statement describing the recipient's policy on prohibited drug use in the workplace, including the consequences associated with prohibited drug use. This policy statement shall include all of the elements specified in § 653.23. Each employer shall disseminate the policy consistent with the provisions of § 653.25.

(b) An education and training program which meets the requirements of § 653.27.

(c) A testing program, as generally described in § 653.29 and that meets the requirements of this part and part 40 of this title.

(d) Procedures for assessing the covered employee who fails to pass a drug test, providing information about services that are available to the covered employee and procedures for referral, dismissal and suspension, as described in § 653.35.

§ 653.23 Policy statement contents.

The policy statement made available to each covered employee shall include, at a minimum, detailed discussion of at least the following:

(a) The identity of the person designated by the employer to answer employee questions about the anti-drug program.

(b) The categories of employees who are subject to the provisions of this part.

(c) Specific information concerning covered employee behavior that is prohibited by this part.

(d) The specific circumstances under which a covered employee will be tested for prohibited drugs under the provisions of this part.

(e) The procedures that will be used to test for drugs, to protect the covered employee and the integrity of the process, to safeguard the validity of the test results, and to ensure that the results are attributed to the correct covered employee.

(f) The requirement that a covered employee submit to drug testing administered in accordance with this part.

(g) A description of the kind of behavior that constitutes a refusal to submit to a drug test and a statement that such a refusal constitutes a failure to pass a drug test.

(h) The consequences for a covered employee who fails to pass or refuses to submit to a drug test under this part, including the mandatory requirements that the covered employee be removed immediately from his or her safety-sensitive function and be evaluated by a substance abuse professional. Additional consequences may include termination of employment, suspension of employment, or other action deemed appropriate by the employer.

(i) If the employer implements elements of an anti-drug program that are in addition to this part (see § 653.15 and § 653.31), the employer shall give each covered employee specific information concerning which provisions are mandated by Federal regulation and which are not.

§ 653.25 Requirement to disseminate policy and educational materials.

Each employer shall provide to every covered employee educational materials that explain the requirements of this part and the employer's policies and procedures with respect to meeting these requirements. Each employer shall

provide written notice to every covered employee and to representatives of employee organizations of the availability of this information.

§ 653.27 Education and training programs.

Each employer shall establish an employee education and training program for all employees who perform safety-sensitive functions, which includes the following:

(a) *Education.* The education component shall include display and distribution of: informational material; a community service hot-line telephone number for employee assistance, if available; and the employer's policy regarding drug use in the workplace.

(b) *Training—(1) All safety-sensitive employees.* This component for safety-sensitive employees must include training on the effects and consequences of drug use on personal health, safety and the work environment, and the manifestations and behavioral cues that may indicate prohibited drug use.

(2) *Supervisors.* Supervisory employees shall receive at least 120 minutes of additional training in the physical, behavioral, and performance indicators of probable drug use if they will be determining when a covered employee is subject to drug testing based on reasonable suspicion under this part.

§ 653.29 Drug testing.

(a) Each employer shall establish a program which provides for drug testing in the following circumstances: Pre-employment, post-accident, reasonable suspicion, random, and return to duty/follow-up.

(b) When administering a drug test, each employer shall ensure that the following drugs are tested for: (1) Marijuana; (2) Cocaine; (3) Opiates; (4) Amphetamines; and (5) Phencyclidine.

(c) See subpart C of this part for details on these test types.

§ 653.31 Requirement for specific notice.

(a) Before performing a drug test, each employer shall provide specific notice to the covered employee:

(1) That the urine sample to be collected will be tested for evidence of the five prohibited drugs listed in § 653.29; and

(2) That the drug test is required by this part or is administered under the employer's own authority.

(b) No employer shall falsely represent that a test is administered under this part.

§ 653.33 Action when employee fails to pass a drug test.

(a) As soon as practicable after receiving notice from the MRO that an employee has failed to pass a drug test, or if an employee refuses to submit to a drug test, the employer shall require that a covered employee cease performing a safety-sensitive function.

(b) Before allowing the covered employee to resume performing a safety-sensitive function, the employer shall ensure that the covered employee meets the requirements of this part for returning to duty, including passing a return to duty drug test, as specified in § 653.49.

§ 653.35 Information, referral, evaluation, and rehabilitation.

(a) A covered employee who fails to pass a drug test under this part shall be advised by the employer of the resources available to the covered employee in evaluating and resolving problems associated with prohibited drug use, including the names, addresses, and telephone numbers of substance abuse professionals and counselling and treatment programs.

(b) The employer shall ensure that each covered employee who fails to pass a drug test or who refuses to take a drug test shall be evaluated by a substance abuse professional who shall determine whether the covered employee is in need of assistance in resolving problems associated with prohibited drug use.

(c) The employer, consistent with its adopted policy, may determine that, as the result of the failure to pass a drug test or refusal to take a drug test and an employee assessment by the SAP, to take action against the covered employee. Such action could be required rehabilitation, suspension or termination.

(d) The employer shall ensure that, before returning to duty to perform a safety-sensitive function, each covered employee has complied with the referral and evaluation provisions of this part and has passed a return to duty drug test under § 653.49.

(e) Evaluation and rehabilitation may be provided by the employer, by a health care provider under contract with the employer, or by a health care provider not affiliated with the employer.

Subpart C—Types of Drug Testing

§ 653.41 Pre-employment/pre-duty testing.

(a) An employer may not hire an individual to perform a safety-sensitive function unless the individual passes a drug test administered under this part.

(b) An employer may not transfer an employee who does not perform a safety-sensitive function to perform a safety-sensitive function until the employee passes a drug test administered under this part.

(c) If an applicant or employee drug test is cancelled, the employer shall require the employee or applicant to submit to and pass another drug test.

§ 653.43 Reasonable suspicion testing.

(a) An employer shall require a covered employee to submit to a drug test when the employer has reasonable suspicion to believe that the covered employee has used a prohibited drug.

(b) The employer's determination that reasonable suspicion exists to require the covered employee to undergo a drug test shall be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, or speech of the covered employee. The required observations must be made by a supervisor who is trained in detecting the symptoms of drug use.

§ 653.45 Post-accident testing.

(a) If there is an accident which involves the loss of human life, each surviving covered employee present and on duty in the revenue service vehicle at the time of the accident and any covered employee involved in the most recent maintenance or other preparation of the vehicle before being placed into revenue service shall be tested for use of prohibited drugs.

(b) If there is no loss of human life, an employer shall test each surviving covered employee present and on duty in the vehicle at the time of the accident and any covered employee involved in the most recent maintenance or other preparation of the vehicle being placed into revenue service, unless the employer determines, using the best information available at the time of the decision, that the covered employee's performance can be discounted completely as a contributing factor to the accident.

(c) An employer shall ensure that a covered employee required to be tested under this section is tested as soon as practicable and within 32 hours of the accident. If a covered employee leaves the scene of the accident without a valid reason or cannot be located before submission to any test, the employer may treat this action as a refusal to submit to testing.

(d) Nothing in this section shall be construed to require the delay of necessary medical attention for injured people following an accident or to prohibit a covered employee from leaving the scene of an accident for the period necessary to obtain assistance in responding to the accident or to obtain necessary emergency medical care.

§ 653.47 Random testing.

(a) Each employer shall, at various times, randomly select covered employees for unannounced drug testing under procedures set forth in part 40 of this title. The selection of covered employees shall be made by a scientifically valid method, such as a random-number table or a computer-based random number generator that is matched with covered employees' Social Security numbers, payroll identification numbers, or other comparable identifying numbers.

(b) During each 12 months following the start of the antidrug program required by this part, the employer shall meet the following conditions:

(1) The dates for administering unannounced testing of randomly-selected covered employees shall be spread reasonably throughout the 12-month period; and

(2) The number of covered employees randomly selected for testing during the 12-month period shall be equal to an annual rate of at least 50 percent of the total number of covered employees subject to drug testing under this part.

(c) Each covered employee shall be in a pool from which random selection is made. Each covered employee in the pool shall have an equal chance of selection and shall remain in the pool, whether or not the covered employee is ever tested.

(d) (1) Each employer shall ensure that each covered employee who is not performing a safety-sensitive function at the time of notification of selection for random testing shall proceed to the collection site immediately.

(2) Each employer shall ensure that each covered employee, who is performing a safety-sensitive function at the time of notification of selection for random testing, shall cease performing the safety-sensitive function and proceed to the collection site as soon as practicable.

§ 653.49 Return to duty testing and follow-up testing.

(a) *General.* Each employer shall ensure that, before returning to duty to perform a safety-sensitive function, each covered employee who has refused to submit to a drug test or has failed to pass a drug test—

(1) Has been evaluated by a substance abuse professional to determine whether the covered employee has properly followed the recommendations for action by the substance abuse professional, including participation in any rehabilitation program, and is ready to return to duty to perform his or her safety-sensitive functions; and

(2) Has passed a return to duty drug test. If a covered employee drug test is cancelled, the employer shall require the employee to submit to and pass another drug test.

(b) *Marine employers.* Marine employers subject to U.S. Coast Guard chemical testing regulations shall ensure that each covered employee is evaluated by a Medical Review Officer.

(c) *Follow-up.* Each employer shall ensure that each covered employee who returns to duty after a required evaluation made under § 653.35 is subject to unannounced follow-up drug testing for up to 60 months. The substance abuse professional shall determine the frequency and duration for this testing, so long as a minimum of six tests are administered to the covered employee within the first twelve months of the employee's return to duty. Once the minimum number of follow-up tests have been administered, the substance abuse professional may determine that such testing is no longer needed. Such determination shall be in writing with a copy provided to the employer and the covered employee.

Subpart D—Drug Testing Procedures

§ 653.61 Substance abuse professional.

(a) Each employer's anti-drug program shall have available the services of a designated substance abuse professional.

(b) The substance abuse professional shall evaluate whether each covered employee who has refused to submit to a drug test or failed to pass a drug test is in need of assistance in resolving problems associated with prohibited drug use.

(c) The substance abuse professional shall evaluate whether each covered employee who has refused to submit to a drug test or failed to pass a drug test has properly followed the SAP's recommendations and whether the covered employee is ready to return to duty to perform his or her safety-sensitive functions.

(d) The substance abuse professional shall determine the number of months each covered employee will be subject to follow-up testing after returning to duty, consistent with § 653.49(b).

§ 653.63 Split sample procedure.

(a) The donor shall urinate into a collection container, which the collection site person, in the presence of the donor, after determining specimen temperature, pours into two specimen bottles. (In an emergency, such as a post-accident test in which a collection container and two specimen bottles are not available, the collection site person may direct the employee to provide the specimen in a primary container.) The amount exceeding 30 ml. is poured by the collection site person into a smaller split specimen container.

(b) The collection site person shall pour 30 ml. into a specimen bottle for the primary specimen.

(c) The collection site person shall pour the remaining amount of urine into another specimen bottle for the split specimen.

(d) Both bottles shall be shipped together to the laboratory, with copies one, two, and three of the chain of custody form.

(e) If the test result of the primary specimen is verified positive, the covered employee may request (in writing) that the MRO direct that the split specimen be tested in a different DHHS-certified laboratory for presence of the drug(s) for which a positive result was obtained in the test of the primary specimen. The MRO shall honor such a request if it is made within 72 hours of the employee having been notified of the verified positive test result.

(f) When the MRO informs the laboratory that the covered employee has requested such a test of the split sample, the laboratory shall forward the split specimen bottle, with seal intact, to a different DHHS-approved laboratory. Copy 3 of the chain of custody form shall be forwarded with an appropriate chain of custody entry.

(g) The result for the test of the split sample is transmitted by the second laboratory to the MRO without regard to the cutoff values of § 40.29 of this title.

(h) Removal from a safety-sensitive function mandated by this part is not stayed pending the result of the test of the split specimen.

(i) If the result of the test of the split specimen is negative the MRO shall cancel the test.

Subpart E—Administrative Requirements

§ 653.71 Retention of records.

(a) *General requirement.* Each employer shall maintain records of its anti-drug program as provided in this section. The records shall be maintained in a secure location with controlled access.

(b) *Period of retention.* In determining compliance with the retention period requirement, each record shall be maintained for the specified period of time, measured from the date of the document's or data's creation. Each employer shall maintain the records in accordance with the following schedule:

(1) *Five years:* Records of covered employee positive drug test results,

documentation of refusals to take required drug tests, and covered employee referrals to the SAP.

(2) *Two years:* Records related to the collection process and employee training.

(3) *One year:* Records of negative drug test results.

(c) *Types of records.* The following specific records must be maintained.

(1) Records related to the collection process:

(i) Collection logbooks, if used.

(ii) Documents relating to the random selection process.

(iii) Documents generated in connection with decisions to administer reasonable suspicion drug tests.

(iv) Documents generated in connection with decisions on post-accident testing.

(v) MRO documents verifying existence of a medical explanation of the inability of a covered employee to provide an adequate urine sample.

(2) Records related to test results:

(i) The employer's copy of the chain of custody form;

(ii) Documents related to the refusal of any covered employee to submit to a drug test required by this part.

(iii) Documents presented by a covered employee to dispute the result of a drug test administered under this part.

(3) Records related to other violations of this part.

(4) Records related to referral and return to duty and follow-up:

(i) Records pertaining to a determination by a substance abuse professional concerning a covered employee's need for referral or a determination concerning a covered employee's suitability to return to work as a covered employee.

(ii) Records concerning a covered employee's entry into and completion of the program of rehabilitation recommended by the substance abuse professional.

(5) Records related to employee training:

(i) Training materials on drug use awareness, including a copy of the employer's policy on prohibited drug use.

(ii) Documentation of compliance with the requirements of subpart B of this part.

(iii) Names of covered employees attending training on prohibited drug use and the dates and times of such training.

(iv) Documentation of training provided to supervisors for the purpose of qualifying the supervisors to make a determination concerning the need for drug testing based on reasonable suspicion.

(v) Certification that any training conducted under this part complies with the requirements for such training.

§ 653.73 Reporting of results in a management information system.

(a) Each employer shall submit to FTA's Office of Safety by February 15 a report covering the previous calendar year, which summarizes the results of its anti-drug program.

(b) Employers that are subject to more than one DOT agency drug regulation shall identify each covered employee covered by the regulations of more than one DOT agency. The identification shall be by the total number of such covered employees and categories of covered functions.

(c) The employer shall remain responsible for ensuring the accuracy and timeliness of each report submitted by the employer, consortium or joint enterprise, or by a third-party service provider acting on the employer's behalf.

(d) The report shall be submitted on the form specified by the FTA. Each report shall contain:

(1) Number of covered employees by employee category.

(2) Number of covered employees subject to testing under the anti-drug regulations of more than one DOT Agency, identified by each agency.

(3) Number of specimens collected by type of test (i.e., pre-employment, periodic, random, etc.) and employee category.

(4) Number of positives verified by a Medical Review Officer (MRO) by type of test, type of drug, and employee category.

(5) Number of negatives verified by a MRO by type of test and employee category.

(6) Number of persons denied a position as a covered employee following a verified drug test.

(7) Number of covered employees verified positive by a MRO who were returned to duty in covered positions during the reporting period.

(8) Number of employees with tests verified positive by a MRO for multiple drugs.

(9) Number of covered employees who refused to submit to a drug test required under this part, and the action taken in response to the refusal(s).

(10) Number of covered employees and supervisors who have received required training during the reporting period.

(e) The data shall be submitted on the form specified by the FTA.

§ 653.75 Availability and disclosure of information.

(a) Except as required by law, or expressly authorized or required in this section, no employer may release information pertaining to a covered employee that is contained in records required to be maintained by § 653.71.

(b) A covered employee is entitled, upon written request, to obtain copies of any records pertaining to the covered employee's use of prohibited drugs, including any records pertaining to his or her drug tests. The employer shall provide promptly the records requested by the employee. Access to a covered employee's records shall not be contingent upon payment for records other than those specifically requested.

(c) An employer shall permit access to all facilities utilized in complying with the requirements of this part to the Secretary of Transportation or any DOT agency with regulatory authority over the employer or any of its employees.

(d) An employer shall disclose data for its drug testing program and any other information pertaining to the employer's anti-drug program required to be maintained by this part, when requested by the Secretary of Transportation or any DOT agency with regulatory authority over the employer or covered employee.

(e) When requested by the National Transportation Safety Board as part of an accident investigation, employers shall disclose information related to the employer's administration of a drug test following the accident under investigation.

(f) Records shall be made available to a subsequent employer upon receipt of written request from the covered employee. Subsequent disclosure by the recipient is permitted only as expressly authorized by the terms of the covered employee's request.

(g) An employer may disclose information required to be maintained under this part pertaining to a covered employee to the employee or the decisionmaker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the individual, and arising from the results of a drug test administered under this part (including, but not limited to, a worker's compensation, unemployment compensation, or other proceeding relating to a benefit sought by the covered employee.)

(h) An employer shall release information regarding a covered employee's record as directed by the specific, written consent of the employee authorizing release of the information to an identified person.

§ 653.77 Requirement to certify compliance.

(a) Each recipient of FTA financial assistance shall certify annually to the applicable FTA Regional Office compliance with the requirements of this part, including the training requirements. Large operators shall certify compliance initially by [3 months or 6 months from publication of the final rule]. Small operators and States shall certify compliance initially by [6 months or 12 months from publication of the final rule].

(b) Each certification must be authorized by the organization's governing board or other authorizing official. Each certification must be signed by a party specifically authorized to do so. Each certification must comply with the applicable sample certification provided in the appendix to this part.

Appendix A to Part 653—Certification of Compliance

This appendix contains two separate examples of certification language. The first example consists of the generally applicable certification language. Example II takes into account employers who are covered by the FRA's anti-drug regulation.

I.

(a) *For recipients who are large or small operators:*

I, (name), (title), certify that (name of recipient) and its contractors, as required, for (name of recipient), has established and implemented an anti-drug program in accordance with the terms of 49 CFR part 653. I further certify that the employee training conducted under this part meets the requirements of 49 CFR part 653.

(b) *For States certifying on behalf of its subrecipients and their contractors, as required, shall be as follows:*

I, (name, title) on behalf of (STATE) certify that, to the best of my knowledge and as the result of due diligence, the entities on the attached list of FT Act subrecipients operating in this State, have established and implemented anti-drug programs in accordance with the terms of 49 CFR part 653.

II.

The text of the certification of an employer that provides commuter rail transportation service regulated by the Federal Railroad Administration shall be as follows:

I, (name), (title), certify that (name of recipient) and its contractors, as required, for (name of recipient), has an anti-drug program that meets the requirements of the Federal Railroad Administration's regulations for employees regulated by the Federal Railroad Administration, and has established and implemented an anti-drug program in accordance with the terms of 49 CFR part 653 for all other covered employees who perform safety-sensitive functions.

BILLING CODE 4910-57-M

APPENDIX B TO PART 653 - DRUG AND ALCOHOL TESTING MIS DATA COLLECTION FORM

GENERAL INSTRUCTIONS

This reporting form includes three parts. Collectively, these parts address the data elements required in the Federal Transit Administration (FTA) and the U.S. Department of Transportation (DOT) drug and alcohol testing regulations. Each part of the form is preceded by instructions which outline and explain the information requested and indicate the probable sources for this information. The three parts of the form are:

Section	Instructions Pages	Reporting Form Pages
I. ORGANIZATIONAL INFORMATION	i-iii	1-2
II. DRUG TESTING INFORMATION	iii-vii	3-11
III. ALCOHOL TESTING INFORMATION	viii-xii	12-19

I. ORGANIZATIONAL INFORMATION

INSTRUCTIONS

This part of the reporting form includes two sections. These sections, the page number for the instructions, and the page location on the reporting form are:

Section	Instructions Page	Reporting Form Page
A. EMPLOYER INFORMATION	i	1
B. COVERED EMPLOYEES	ii	2

Page 1 **EMPLOYER INFORMATION** (Section A) requires the name of the organization for which the report is done and a current address. Below this, information must be entered for the consortium used (if applicable). Finally, a signature and date are required certifying the correctness and completeness of the form. Note: A separate report must be completed by each FTA grantee for each of its contract

service and contract maintenance providers. States must report on behalf of each Section 18 grantee and their contractors.

Page 2

COVERED EMPLOYEES (Section B) requires a count for each employee category that must be tested under the FTA drug testing regulation. For the FTA this includes Revenue Vehicle Operation, Transportation Support, Revenue Vehicle Inspection and Maintenance, Vehicle Maintenance Support, Non-Vehicle Maintenance Support, and Supervisors. The most likely source for this information is the employer's personnel department. These counts should be based on the transit system's or contractor's records for the reported year. The **TOTAL** is a count of **all** covered employees for **all** categories combined, i.e., the sum of the columns.

Additional information must be completed if the employer has personnel who perform duties covered by the anti-drug rules of more than one DOT operating administration. **NUMBER OF EMPLOYEES COVERED BY MORE THAN ONE DOT OPERATING ADMINISTRATION**, requires that you identify the number of employees in each employee category under the appropriate additional DOT operating administration(s).

For Office Use Only

FTA DRUG AND ALCOHOL TESTING DATA COLLECTION FORM

YEAR COVERED BY THIS REPORT: 19__

A. EMPLOYER INFORMATION

Company _____

Address _____

_____

Consortium Used (if applicable)

Name _____

Address _____

_____

Phone _____

I, the undersigned, certify the attached Federal Transit Administration Annual Anti-Drug Program Report, is to the best of my knowledge and belief, a true, correct, and complete form for the period stated.

_____
Signature

_____
Title

_____
Date of Signature

_____
Phone Number

Title 18, U.S.C. Section 1001, makes it a criminal offense subject to a maximum fine of $10,000, or imprisonment for not more than 5 years, or both, to knowingly and willfully make or cause to be made any false or fraudulent statements or representations in any matter within the jurisdiction of any agency of the United States.

B. COVERED EMPLOYEES

COVERED EMPLOYEES						
EMPLOYEE CATEGORY	NUMBER OF COVERED EMPLOYEES	NUMBER OF EMPLOYEES COVERED BY MORE THAN ONE DOT OPERATING ADMINISTRATION				
		FAA	FHWA	FRA	RSPA	USCG
Revenue Vehicle Operation						
Transportation Support						
Revenue Vehicle Inspection and Maintenance						
Vehicle Maintenance Support						
Non-Vehicle Maintenance Support						
Supervisors						
TOTAL						

II. DRUG TESTING INFORMATION

INSTRUCTIONS

The following instructions are to be used as a guide for completing the drug testing information in the Federal Transit Administration (FTA) and the U.S. Department of Transportation (DOT) **Drug and Alcohol Testing Management Information System Data Collection Form**. These instructions outline and explain the information requested and indicate probable sources for this information. A sample testing results table with a narrative explanation is provided on pages iv-vi as an example to facilitate the process of completing the form correctly.

This part of the reporting form includes four sections. These sections address the data elements required in the regulations. These sections, the page number for the instructions, and the page location on the reporting form are:

Section	Instructions Page	Reporting Form Page
A. JOB APPLICANT TESTING INFORMATION	iv	4
B. EMPLOYEE TESTING	vi	5-9
C. OTHER TESTING/PROGRAM INFORMATION	vii	10
D. TRAINING/EDUCATION	vii	11

Sections A and B are used to summarize the drug testing results for covered employees. There are six tables to be completed (one in Section A and five in Section B). The first table (Section A) is where you enter the data on pre-employment testing. The five tables in Section B are for entering drug testing data on periodic, random, post-accident, reasonable cause, and return to duty testing, respectively. Items necessary to complete these tables include:

1) the number of specimens collected in each employee category;
2) the number of specimens tested which were verified negative and verified positive for any drug(s); and
3) individual counts of those specimens which were verified positive for each of the five drugs.

Do not include results of quality control (QC) samples submitted to the testing laboratory in any of the tables.

A sample table with detailed instructions is provided for Section A, **JOB APPLICANT TESTING INFORMATION**. The format and explanations used for the sample table apply to all six of the tables in Sections A and B.

Information on actions taken with those persons testing positive is required at the end of both Sections A and B. Specific instructions for providing this latter information are given after the instructions for completing the tables in Sections A and B.

Page 4

JOB APPLICANT TESTING INFORMATION (Section A) requires information for pre-employment testing. All numbers entered into this table should be separated into the category of employment for which the applicant was applying. A sample table with example numbers is presented on page v.

Three types of information are necessary to complete the left side of this table. The first blank column with the heading "**NUMBER OF SPECIMENS COLLECTED,**" requires a count for all collected specimens by employee category. It should not include refusals to test. The second blank column with the heading "**NUMBER OF SPECIMENS VERIFIED NEGATIVE,**" requires a count for all completed tests by employee category that were verified negative by your Medical Review Officer (MRO).

The third blank column with the heading "**NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS,**" refers to the number of specimens provided by job applicants that were verified positive. "Verified positive" means the results were verified by your MRO.

The right hand portion of this table, with the heading "**NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG,**" requires counts of positive tests **for each** of the five drugs for which tests were done, i.e., marijuana (THC), cocaine, phencyclidine (PCP), opiates, and amphetamines. The number of specimens positive for each drug should be entered in the appropriate column for that drug type. Again, "verified positive" refers to test results verified by your MRO.

If an applicant tested positive for more than one drug; for example, both marijuana and cocaine, that person's positive results would be included once in each of the appropriate columns (marijuana and cocaine).

Each column in the table should be added and the answer entered in the row marked "**TOTAL**".

A sample table is provided on page v with example numbers.

Page 4

Below the table for pre-employment testing information is a box with the heading "**Number of persons denied a position as a covered employee following a verified positive drug test**". This is simply a count of those persons who were not placed in a covered position because they tested positive for one or more drugs.

SAMPLE APPLICANT TEST RESULTS TABLE

The following example is for Section A, **JOB APPLICANT TESTING INFORMATION**, which summarizes pre-employment testing results. The procedures detailed here also apply to the tables in Section B which require you to summarize testing results for employees. This example uses the categories "Revenue Vehicle Operation" and "Transportation Support" to illustrate the procedures for completing the form.

A Urine specimens were collected for 157 job applicants for revenue vehicle operation positions during the reporting year. This information is entered in the first blank column of the table in the row marked "Revenue Vehicle Operation".

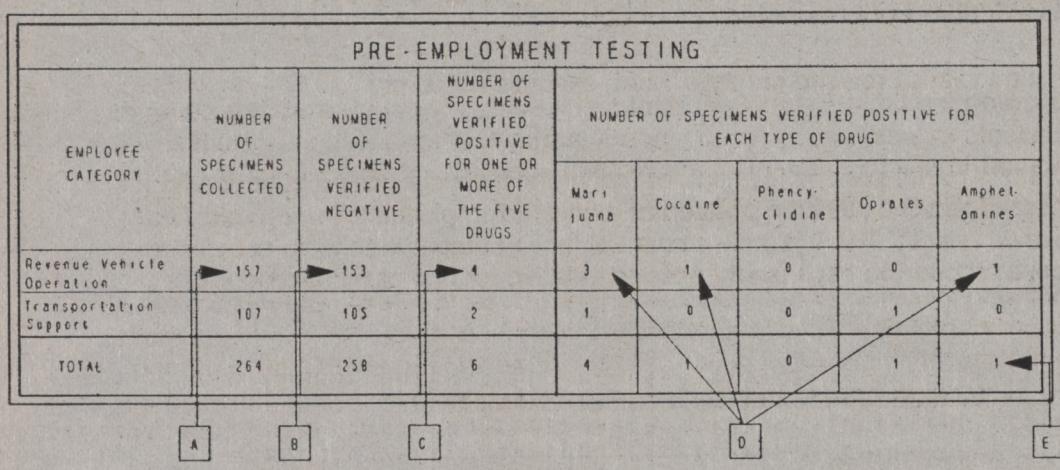
B The Medical Review Officer (MRO) for the transit system or contractor reported that 153 of those 157 specimens from applicants for revenue vehicle operation positions were negative (i.e., no drugs were detected). Enter this information in the second blank column of the table in the row marked "Revenue Vehicle Operation".

C The MRO for the transit system or contractor reported that 4 of those 157 specimens from applicants for revenue vehicle operation positions were positive (i.e., a drug or drugs were detected). Enter this information in the third blank column of the table in the row marked "Revenue Vehicle Operation".

D With the 4 specimens that tested positive, the following drugs were detected:

Specimen	Drugs
#1	Marijuana
#2	Amphetamines
#3	Marijuana and Cocaine (Multi-drug specimen)
#4	Marijuana

Marijuana was detected in three (3) specimens, cocaine in one (1), and amphetamines in one (1). This information is entered in the columns on the right hand side of the table under each of these drugs. Two different drugs were detected in specimen #3 (multi-drug) so an entry is made in both the marijuana and the cocaine column for this specimen. Information on multi-drug specimens must also be entered in Section C, **OTHER TESTING/PROGRAM INFORMATION**, on page 10 of the reporting form.



PRE-EMPLOYMENT TESTING

EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana	Cocaine	Phencyclidine	Opiates	Amphetamines
Revenue Vehicle Operation	157	153	4	3	1	0	0	1
Transportation Support	107	105	2	1	0	0	1	0
TOTAL	264	258	6	4	1	0	1	1

A B C D E

Please note that the sample data collection form also has information for transportation support workers on line two. The same procedures outlined for revenue vehicle operators should be followed for entering the data on transportation support personnel. With applicants for transportation support positions, 107 specimens were collected resulting in 105 verified negatives and 2 verified positives -- 1 for marijuana and 1 for opiates. This information is entered in the row marked "Transportation Support".

E

The last row, marked "TOTAL", requires you to add the numbers in each of the columns. With this example, 157 specimens from applicants for revenue vehicle operation positions were collected and 107 for applicants for transportation support positions. The total for that column would be 264 (i.e., 157+107). The same procedure should be used for each column, i.e., add all the numbers in that column and place the answer in the last row.

Note that adding up the numbers for each type of drug in a row ("NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG") will not always match the number entered in the third column, "NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS". The total for the numbers on the right hand side of the table may differ from the number of specimens testing positive since some specimens may contain more than one drug.

Remember that the same procedures indicated above are to be used for completing all of the tables in Sections A and B.

Pages 5-9

EMPLOYEE TESTING (Section B), as indicated, requires information for company employees in **covered positions only. A separate table must be completed for** each category of test. These categories include: (1) periodic, (2) random, (3) post-accident, (4) reasonable cause, and (5) return to duty testing. These tables are to be filled out like the sample table above. Again, these numbers **do not** include refusals for testing.

Page 7

Following the table for post-accident test results, you must provide a count of accidents in which resulted in a positive drug test for any covered employee involved in the accident. This information should be available from the safety program manager or the drug program manager.

Page 9

Following these tables that summarize **EMPLOYEE TESTING**, you must provide counts for employees who have tested positive and are currently in, or have completed rehabilitation, and have returned to work in a covered position. Report this information only for employees who tested positive during this reporting period. This information should be available from the personnel office and/or drug program manager.

Page 10 **OTHER TESTING/PROGRAM INFORMATION** (Section C) requires that you complete a table dealing with specimens positive for more than one drug and a table dealing with employees who refused to submit to a drug test.

Page 10 **SPECIMENS VERIFIED POSITIVE FOR MORE THAN ONE DRUG** requires information on specimens that contained more than one drug. Indicate the **EMPLOYEE CATEGORY** and the **NUMBER OF VERIFIED POSITIVES**, then write the number of verified positives in the appropriate columns indicating the combination of drugs reported. For example, if marijuana and cocaine were detected in 3 revenue vehicle operator specimens, then you would write "Revenue Vehicle Operation" as the employee category, "3" as the number of verified positives, and "3" in the columns for "Marijuana" and "Cocaine". If marijuana and opiates were detected in 2 revenue vehicle operator specimens, then you would write "Revenue Vehicle Operation" as the employee category, "2" as the number of verified positives, and "2" in the columns for "Marijuana" and "Opiates".

Page 10 **EMPLOYEES WHO REFUSED TO SUBMIT TO A DRUG TEST** requires information on the **NUMBER OF COVERED EMPLOYEES** who refused to submit to a drug test required under this regulation, and a description of the **ACTION TAKEN** in response to the refusal. An example of an action taken would be "removed from covered duties pending termination".

Page 11 **TRAINING/EDUCATION** (Section D) requires information on the number of covered employees and supervisory personnel who have received the required drug training during the current reporting period.

READ BEFORE COMPLETING THE REMAINDER OF THIS FORM:

1. All items refer to the **current** reporting period **only** (for example, January 1, 1993 - December 31, 1993).

2. This report is only for testing **REQUIRED BY THE FEDERAL TRANSIT ADMINISTRATION (FTA) AND THE U.S. DEPARTMENT OF TRANSPORTATION (DOT)**:

   - Results should be reported only for employees in **COVERED POSITIONS** as defined by the FTA drug testing regulation.

   - The information requested should only include testing for marijuana (THC), cocaine, phencyclidine (PCP), opiates, and amphetamines using the standard procedures required by DOT regulation 49 CFR Part 40.

3. Information on refusals for testing should only be reported in Section E ("OTHER TESTING INFORMATION"). Do not include refusals for testing in other sections of this report.

4. Do not include the results of any quality control (QC) samples submitted to the testing laboratory in any of the tables.

5. Complete all items; DO NOT LEAVE ANY ITEM BLANK. If the value for an item is zero (0), place a zero (0) on the form.

This part of the form requires information on VERIFIED POSITIVE and VERIFIED NEGATIVE drug tests. These are the results that are reported to you by your Medical Review Officer (MRO).

A. JOB APPLICANT TESTING INFORMATION

PRE-EMPLOYMENT TESTING								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Revenue Vehicle Operation								
Transportation Support								
Revenue Vehicle Inspection and Maintenance								
Vehicle Maintenance Support								
Non-Vehicle Maintenance Support								
Supervisors								
TOTAL								

Number of persons denied a position as a covered employee following a verified positive drug test: [ ]

B. EMPLOYEE TESTING

PERIODIC TESTING								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Revenue Vehicle Operation								
Transportation Support								
Revenue Vehicle Inspection and Maintenance								
Vehicle Maintenance Support								
Non-Vehicle Maintenance Support								
Supervisors								
TOTAL								

B. EMPLOYEE TESTING (continued)

RANDOM TESTING								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Revenue Vehicle Operation								
Transportation Support								
Revenue Vehicle Inspection and Maintenance								
Vehicle Maintenance Support								
Non-Vehicle Maintenance Support								
Supervisors								
TOTAL								

B. EMPLOYEE TESTING (continued)

POST-ACCIDENT TESTING								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Revenue Vehicle Operation								
Transportation Support								
Revenue Vehicle Inspection and Maintenance								
Vehicle Maintenance Support								
Non-Vehicle Maintenance Support								
Supervisors								
TOTAL								

Number of accidents, as defined by the FTA, which resulted in a positive drug test for any covered employee who was involved in the accident. [ ]

B. EMPLOYEE TESTING (continued)

REASONABLE CAUSE TESTING								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Revenue Vehicle Operation								
Transportation Support								
Revenue Vehicle Inspection and Maintenance								
Vehicle Maintenance Support								
Non-Vehicle Maintenance Support								
Supervisors								
TOTAL								

B. EMPLOYEE TESTING (continued)

RETURN TO DUTY TESTING								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Revenue Vehicle Operation								
Transportation Support								
Revenue Vehicle Inspection and Maintenance								
Vehicle Maintenance Support								
Non-Vehicle Maintenance Support								
Supervisors								
TOTAL								

Number of employees, currently in or having completed rehabilitation or otherwise qualified to return to duty, who have returned to work in a covered position during this reporting period: [ ]

C. OTHER TESTING/PROGRAM INFORMATION

SPECIMENS VERIFIED POSITIVE FOR MORE THAN ONE DRUG						
EMPLOYEE CATEGORY	NUMBER OF VERIFIED POSITIVES	Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines

EMPLOYEES WHO REFUSED TO SUBMIT TO A DRUG TEST	
NUMBER OF COVERED EMPLOYEES	ACTION TAKEN

D. TRAINING/EDUCATION

Training During Current Reporting Period

Number of covered employees who have received initial training on the consequences, manifestations, and behavioral cues of drug use as required by FTA drug testing regulations: [ ]

Number of supervisory personnel who have received initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable drug use as required by FTA drug testing regulations: [ ]

Number of covered employees who have received recurrent or refresher training on the consequences, manifestations, and behavioral cues of drug use: [ ]

Number of supervisory personnel who have received recurrent or refresher training on the specific contemporaneous physical, behavioral, and performance indicators of probable drug use: [ ]

III. ALCOHOL TESTING INFORMATION

INSTRUCTIONS

The following instructions are to be used as a guide for completing the alcohol testing information for the Federal Transit Administration (FTA) and the U.S. Department of Transportation (DOT) **Drug and Alcohol Testing Management Information System Data Collection Form**. These instructions outline and explain the information requested and indicate probable sources for this information. A sample testing results table with a narrative explanation is provided on pages ix-xi as an example to facilitate the process of completing the form correctly.

This part of the reporting form includes four sections. These sections address the data elements required in the regulations. These sections, the page number for the instructions, and the page location on the reporting form are:

Section	Instructions Page	Reporting Form Page
A. JOB APPLICANT TESTING INFORMATION	ix	13
B. EMPLOYEE TESTING	xi	14-18
C. OTHER TESTING/PROGRAM INFORMATION	xi	18-19
D. TRAINING/EDUCATION	xii	19

Sections A and B are used to summarize the alcohol testing results for covered employees. There are six tables to be completed (one in Section A and five in Section B). The first table (Section A) is where you enter the data on pre-employment/pre-duty testing. The five tables in Section B are for entering alcohol testing data for random, post-accident, reasonable suspicion, return to duty, and follow-up testing, respectively. Items necessary to complete these tables include:

1) the number of initial alcohol tests performed for each employee category;
2) the number of confirmatory alcohol tests performed for each employee category;
3) the number of confirmatory test results which were equal to or greater than 0.04; and
4) the number of confirmatory test results which were equal to or greater than 0.02, but less than 0.04.

A sample table with detailed instructions is provided for Section A, **JOB APPLICANT TESTING INFORMATION**. The format and explanations used for the sample table apply to all six of the tables in Sections A and B.

Information on actions taken with those persons whose alcohol test results were 0.04 or greater is required at the end of both Sections A and B. Specific instructions for providing this latter information are given after the instructions for completing the tables in Sections A and B.

Page 13 **JOB APPLICANT TESTING INFORMATION** (Section A) requires information for pre-employment/pre-duty testing. All numbers entered into this table should be separated into the category of employment for which the applicant was applying. A sample table with example numbers is presented on page x.

Four types of information are necessary to complete the left side of this table. The first blank column with the heading "**NUMBER OF INITIAL TESTS**" requires a count of all initial alcohol tests performed for each employee category. It should not include refusals to test. The second blank column with the heading "**NUMBER OF CONFIRMATORY TESTS**" requires a count of all confirmatory alcohol tests performed for each employee category.

The third blank column with the heading "**NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04**" requires a count for each employee category.

The fourth blank column with the heading "**NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04**" requires a count for each employee category.

Each column in the table should be added and the answer entered in the row marked "**TOTAL**".

A sample table is provided on page x with example numbers.

Page 13 Below the table for pre-employment testing information is a box with the heading "**Number of persons denied a position as a covered employee following a pre-employment/pre-duty alcohol test indicating an alcohol concentration of 0.04 or greater**". Enter the appropriate number in the box provided.

SAMPLE APPLICANT TEST RESULTS TABLE

The following example is for Section A, **JOB APPLICANT TESTING INFORMATION**, which summarizes pre-employment/pre-duty testing results. The procedures detailed here also apply to the tables in Section B which require you to summarize testing results for employees. This example uses the categories "Revenue Vehicle Operation" and "Transportation Support" to illustrate the procedures for completing the form.

A Initial tests were performed on 157 job applicants for revenue vehicle operator positions during the reporting year. This information is entered in the first blank column of the table in the row marked "Revenue Vehicle Operation".

B Confirmatory tests were necessary for 6 of the 157 applicants for revenue vehicle operator positions. Enter this information in the second blank column of the table in the row marked "Revenue Vehicle Operation". The confirmatory test results for these 6 applicants were the following:

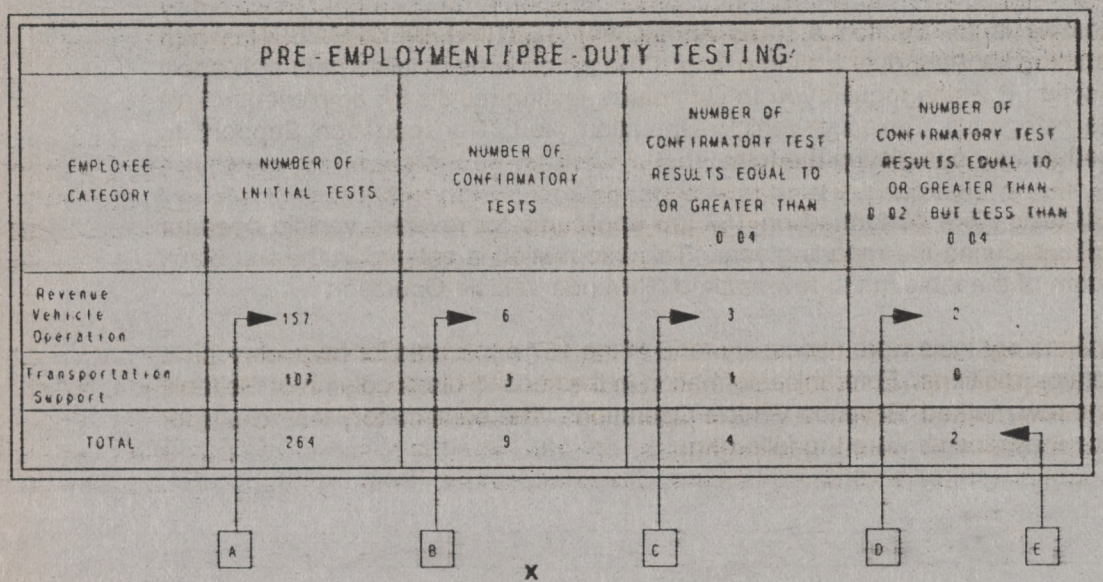
Applicant	Confirmation Result
#1	0.06
#2	0.01
#3	0.11
#4	0.04
#5	0.03
#6	0.02

C The confirmatory test results for 3 of the applicants for revenue vehicle operator positions were equal to or greater than 0.04. Enter this information in the third blank column of the table in the row marked "Revenue Vehicle Operation".

D The confirmatory test results for 2 of the applicants for revenue vehicle operator positions were equal to or greater than 0.02, but less than 0.04. Enter this information in the fourth blank column of the table in the row marked "Revenue Vehicle Operation".

E The last row, marked "TOTAL", requires you to add the numbers in each of the columns. With this example, 157 applicants for revenue vehicle operator positions and 107 applicants for transportation support positions were subjected to initial tests. The total for that column would be 264 (i.e., 157+107). The same procedure should be used for each column. (i.e., add all the numbers in that column and place the answer in the last row).

Please note that the sample data collection form also has information for transportation support workers on line two. The same procedures outlined for revenue vehicle operators should be followed for entering the data on transportation support workers. With applicants for transportation support positions, 107 initial tests were conducted resulting in 3 confirmatory tests. The confirmatory test result for 1 of the transportation support applicants was equal to or greater than 0.04; no results were equal to or greater than 0.02, but less than 0.04. This information is entered in the row marked "Transportation Support".



Note that adding up the numbers for confirmation results in columns three and four will not always match the number entered in the second column, "NUMBER OF CONFIRMATORY TESTS". These numbers may differ since some confirmatory test results may be less than 0.02.

Remember that the same procedures indicated above are to be used for completing all of the tables in Sections A and B.

Pages 14-18 **EMPLOYEE TESTING** (Section B), as indicated, requires information for company employees in **covered positions** only. A separate table must be completed for each category of test. These categories include: (1) random, (2) post-accident, (3) reasonable suspicion, (4) return to duty, and (5) follow-up testing. These tables are to be filled out like the sample table above. Again, these numbers **do not** include refusals for testing.

Page 15 Following the table for post-accident testing results, you must provide a count of accidents in which any covered employee who was involved had a confirmatory alcohol test result of 0.04 or greater. This information should be available from the safety program manager or the alcohol program manager.

Page 17 Following the table that summarizes results for return to duty testing, you must provide a count of the **"Number of employees with a confirmatory alcohol test indicating an alcohol concentration of 0.04 or greater who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in FTA regulations)"**. Report this information only for employees who were tested during this reporting period. This information should be available from the personnel office and/or alcohol program manager.

Pages 18-19 **OTHER TESTING/PROGRAM INFORMATION** (Section C) requires that you provide information on employees who tested positive for drugs and alcohol (at the same time), information on violations of other alcohol provisions (not necessarily resulting in positive alcohol tests), and information on employees who refused to submit to an alcohol test.

Page 18 **Number of employees administered drug and alcohol tests at the same time resulting in a verified positive drug test and an alcohol test indicating an alcohol concentration of 0.04 or greater**, requires that a count of all such employees be entered in the indicated box.

Page 19 **VIOLATIONS OF OTHER ALCOHOL PROVISIONS/PROHIBITIONS OF THIS REGULATION**, requires information on the **NUMBER OF COVERED EMPLOYEES** committing such a violation, a description of the **VIOLATION** committed (e.g., pre-duty alcohol use, on duty alcohol use, on duty alcohol possession), and a description of the **ACTION TAKEN** in response to the violation.

Page 19 **EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST** requires information on the **NUMBER OF COVERED EMPLOYEES** who refused to submit to an alcohol test as required under this regulation, and a description of the **ACTION TAKEN** in response to the refusal.

Page 19 **TRAINING/EDUCATION** (Section D) requires information on the number of supervisory personnel who have received the required alcohol training during the current reporting period.

READ BEFORE COMPLETING THE REMAINDER OF THIS FORM:

1. All items refer to the **current** reporting period **only** (for example, January 1, 1993 - December 31, 1993).

2. This report is only for testing **REQUIRED BY THE FEDERAL TRANSIT ADMINISTRATION (FTA) AND THE U.S. DEPARTMENT OF TRANSPORTATION (DOT)**:

   - Results should be reported only for employees in **COVERED POSITIONS** as defined by FTA alcohol testing regulations.

   - The information requested should only include testing for alcohol using the standard procedures required by DOT regulation 49 CFR Part 40.

3. Information on refusals for testing should only be reported in Section C ("OTHER TESTING/PROGRAM INFORMATION"). Do not include refusals for testing in other sections of this part of the report.

4. Complete all items; DO NOT LEAVE ANY ITEM BLANK. If the value for an item is zero (0), place a zero (0) on the form.

A. JOB APPLICANT TESTING INFORMATION

PRE-EMPLOYMENT/PRE-DUTY TESTING				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Revenue Vehicle Operation				
Transportation Support				
Revenue Vehicle Inspection and Maintenance				
Vehicle Maintenance Support				
Non-Vehicle Maintenance Support				
Supervisors				
TOTAL				

Number of persons denied a position as a covered employee following a pre-employment/pre-duty alcohol test indicating an alcohol concentration of 0.04 or greater: [ ]

B. EMPLOYEE TESTING

RANDOM TESTING				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Revenue Vehicle Operation				
Transportation Support				
Revenue Vehicle Inspection and Maintenance				
Vehicle Maintenance Support				
Non-Vehicle Maintenance Support				
Supervisors				
TOTAL				

B. EMPLOYEE TESTING (continued)

POST-ACCIDENT TESTING				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Revenue Vehicle Operation				
Transportation Support				
Revenue Vehicle Inspection and Maintenance				
Vehicle Maintenance Support				
Non-Vehicle Maintenance Support				
Supervisors				
TOTAL				

Number of accidents, as defined by FTA, in which any covered employee involved in the accident had a confirmatory alcohol test result of 0.04 or greater: [ ]

B. EMPLOYEE TESTING (continued)

REASONABLE SUSPICION TESTING				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Revenue Vehicle Operation				
Transportation Support				
Revenue Vehicle Inspection and Maintenance				
Vehicle Maintenance Support				
Non-Vehicle Maintenance Support				
Supervisors				
TOTAL				

B. EMPLOYEE TESTING (continued)

RETURN TO DUTY TESTING				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Revenue Vehicle Operation				
Transportation Support				
Revenue Vehicle Inspection and Maintenance				
Vehicle Maintenance Support				
Non-Vehicle Maintenance Support				
Supervisors				
TOTAL				

Number of employees with a confirmatory alcohol test indicating an alcohol concentration of 0.04 or greater who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in FTA regulations): [ ]

B. EMPLOYEE TESTING (continued)

FOLLOW-UP TESTING				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Revenue Vehicle Operation				
Transportation Support				
Revenue Vehicle Inspection and Maintenance				
Vehicle Maintenance Support				
Non-Vehicle Maintenance Support				
Supervisors				
TOTAL				

C. OTHER TESTING/ PROGRAM INFORMATION

Number of employees administered drug and alcohol tests at the same time resulting in a verified positive drug test and an alcohol test indicating an alcohol concentration of 0.04 or greater: [ ]

C. OTHER TESTING/PROGRAM INFORMATION (continued)

VIOLATIONS OF OTHER ALCOHOL PROVISIONS/PROHIBITIONS OF THIS REGULATION		
NUMBER OF COVERED EMPLOYEES	VIOLATION	ACTION TAKEN

EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST	
NUMBER OF COVERED EMPLOYEES	ACTION TAKEN

D. TRAINING/EDUCATION

Training During Current Reporting Period

Number of supervisors who have received the required training in determining the existence of reasonable suspicion of alcohol misuse: ☐

BILLING CODE 4910-57-C

Issued: December 2, 1992.

Andrew H. Card, Jr.,

Secretary of Transportation.

Brian W. Clymer,

Administrator.

[FR Doc. 92–29686 Filed 12–10–92; 10:00 am]

BILLING CODE 4910–57–M

federal register

Tuesday
December 15, 1992

Part VII

Department of Transportation

Research and Special Programs Administration

49 CFR Part 199

Drug and Alcohol Testing Programs; Proposed Rules

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Part 199

[Docket No. PS–128; Notice No. 1]

RIN 2137–AC21

Alcohol Misuse Prevention Program

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This proposed rule sets forth regulations to require operators of gas, hazardous liquid and carbon dioxide pipelines and liquefied natural gas (LNG) facilities who are subject to RSPA regulations to implement an alcohol misuse prevention program for employees who perform certain safety-sensitive functions covered by the pipeline safety regulations. The proposed rule is consistent with proposed DOT regulations and the other operating administration alcohol rules.

The proposed rule would require pre-employment/pre-duty, random, reasonable suspicion, post-accident, return-to-duty, and follow-up testing to detect and deter such conduct. As required by this rule, operators would have to remove employees who engaged in prohibited conduct from safety-sensitive functions until certain requirements had been met. Additionally, operators would be required to provide employees with written materials that specifically identify the employees covered by the rule, explain the requirements of this rule, and establish the consequences of engaging in prohibited conduct. Finally, employers would be required to maintain records concerning this program and to report data regarding employee alcohol misuse to RSPA in an annual report. When finalized this rule should increase the overall safety of pipeline operations.

DATES: Comments should be received by April 14, 1993. Late-filed comments will be considered to the extent practicable. Comments on the Secretary's notices appearing elsewhere in today's **Federal Register** should be submitted as directed by that notice. Parties commenting on the testing procedures are requested to file their comments with both the Department of Transportation's (DOT) Docket in that rulemaking and with RSPA's Docket in this rulemaking. RSPA requests that commenters highlight any pipeline industry-specific issues regarding the testing procedures. Commenters should be aware that it is DOT's intention that testing procedures apply to any alcohol testing conducted under regulations issued by the Department's Operating Administrations (OAs).

ADDRESSES: Send comments on this notice in duplicate to the Dockets Unit, room 8421, Research and Special Programs Administration, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Identify the docket and notice numbers stated in the heading of this notice. All comments and other docketed material will be available for inspection and copying in room 8421 between the hours of 8:30 a.m. and 5 p.m. each working day.

FOR FURTHER INFORMATION CONTACT: Mr. Richard L. Rippert, Office of Pipeline Safety Enforcement, RSPA, DOT, 400 Seventh Street, SW., Washington, DC 20590 (202 366–6223).

SUPPLEMENTARY INFORMATION:

Background

The misuse of drugs and alcohol by individuals performing safety-sensitive pipeline functions has long been of concern to RSPA and to DOT. RSPA has promulgated drug testing regulations addressing part of this concern. DOT, seeking to determine the extent of any alcohol problem in the transportation industries, issued an advance notice of proposed rulemaking (ANPRM) on November 2, 1989. The ANPRM asked for comment on a variety of issues related to preventing alcohol misuse by transportation workers. The comments to this ANPRM are discussed in detail in the general preamble published by the DOT Secretary's Office elsewhere in today's issue of the **Federal Register**.

The Omnibus Transportation Employee Testing Act of 1991 requires the Secretary of Transportation to issue regulations mandating alcohol testing for highway, aviation, mass transit and rail employees regulated by the Federal Highway Administration (FHWA), Federal Aviation Administration (FAA), Federal Transit Administration (FTA) (formerly Urban Mass Transportation Administration), and Federal Railroad Administration (FRA) respectively. RSPA is today proposing alcohol testing rules under its own existing statutory authority to ensure application of DOT's drug and alcohol testing regulations to all safety-sensitive employees in the transportation industry. This Notice of Proposed Rulemaking (NPRM) is consistent with the NPRMs of other OAs, with such alterations as necessary to meet the special circumstances of the pipeline industry.

On November 21, 1988 (53 FR 47084), RSPA published a final rule setting forth regulations requiring pipeline operators subject to part 192 (natural gas), 193 (liquefied natural gas), or 195 (hazardous liquids, including carbon dioxide) to implement an anti-drug program for employees who perform operation, maintenance, or emergency-response functions on a pipeline or at an LNG facility. However, the anti-drug rules do not apply to operators of "master meter systems" defined in § 191.3. On December 18, 1989 (54 FR 51842) RSPA published a final rule which addressed petitions submitted for reconsideration. Drug testing, under part 199, became effective on April 20, 1990, for large operators and August 21, 1990, for small operators. Many aspects of the proposed alcohol misuse prevention program would mirror those of the anti-drug program, including covered employers, covered employees, and the use of phased-in implementation.

Comments to the DOT ANPRM

As noted above, in late 1989, DOT issued an ANPRM in which it asked a number of questions about regulating alcohol use in the various transportation industries. Of the 23 commenters representing pipeline related interests, nine believed that limited alcohol testing should be instituted in the pipeline context. Several commenters indicated that while drugs are a societal problem, alcohol abuse is the most abused substance in the pipeline industry. Others indicated that alcoholism is usually found as a cohabitant in substance abuse whenever drug abuse is detected and treated. In many cases, they indicated that alcohol abuse leads to drug abuse. One commenter indicated that its employee assistance program reported that among substance abusers, there were approximately four times as many individuals counseled for alcohol abuse as there were for drug abuse. The other 14 commenters believed that RSPA's current regulatory scheme for drug testing was sufficient to address any problem that might exist, although most commenters also felt that there was no indication that such a problem did, in fact, exist. Several commenters noted their long-standing alcohol testing programs have been successful without governmental regulation. Those few commenters who believed that further action by RSPA would be appropriate favored a combination of alcohol education and training and enforcement of the drug regulations already in place.

Statutory Authority

The two primary statutes under which RSPA administers the pipeline safety program are the Natural Gas Pipeline

Safety Act of 1968, as amended (49 App. U.S.C. 1671 *et seq.*) and the Hazardous Liquid Pipeline Safety Act of 1979, as amended (49 App. U.S.C. 2001 *et seq.*). RSPA also regulates operators of offshore gas gathering lines under the Hazardous Materials Transportation Act (49 App. U.S.C. 1801 *et seq.*).

Authority to implement alcohol education, awareness, and testing programs is derived from the broad authority granted in the above-cited statutes. This authority is applicable to various aspects of pipeline facilities affecting pipeline safety, including design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities. [49 App. U.S.C. 1672 and 2002.] Under this authority, RSPA can set qualifications, such as experience and training, for pipeline personnel. This authority extends to allow RSPA to mandate certification programs for such personnel. [49 App. U.S.C. 1672(a)(1) and 2002(c).]

In *International Brotherhood of Electrical Workers, Local 1245, et al.* v. *Skinner*, 913 F.2d 1454 (9th Cir. 1990), the Court upheld RSPA's drug testing rules even though there was no evidence of a particularized drug program in the pipeline industry. The Court also concluded, based upon an analysis of the statutory guidelines for issuance of regulations, that the rules were not arbitrary or capricious.

Alcohol Misuse Prevention Program

Section-by-Section Analysis

Applicability

The RSPA proposed rule contains a section specifically describing the applicability of the rule for various operators under the Pipeline Safety Regulations. This is necessary for clarity, since many RSPA operators have portions of their operations regulated by other operating administrations within the Department.

Definitions

The proposed definitions of accident, Administrator, covered employee, employer, safety-sensitive function and State agency are consistent with the definitions used in the anti-drug program.

Preemption of State and Local Laws

The proposed rule would include the test for preemption of State or local pipeline safety standards under the Natural Gas Pipeline Safety Act and the Hazardous Liquid Pipeline Safety Act. Clear expression of the preemptive effect intended by this Federal safety rule is important to preserve the careful balances (private versus public rights, benefits versus costs) which are achieved in the rule. Constitutional limitations on State and local inconsistent regulation preserve these balances. Therefore, the proposed rule also includes the two-pronged test derived from judicial decisions on preemption of inconsistent State and local regulation under the Constitution.

As proposed, State and local requirements are preempted when: (1) It is not possible to comply with both the Federal and the State or local requirements, (2) Compliance with the State or local government requirement would frustrate the Federal requirement, or (3) The State or local requirement is a pipeline safety standard applicable to interstate pipeline facilities.

Employers Who Would Be Required To Establish Programs

During the development and implementation of RSPA's industry anti-drug program, RSPA carefully considered the appropriate scope of the rule. This NPRM proposes to include essentially the same classes of employers and covered functions as are covered by the anti-drug rule. Operators of gas, hazardous liquid and carbon dioxide pipelines and liquefied natural gas facilities, who are subject to 49 CFR part 192, 193, or 195, are required to implement an alcohol misuse prevention program for covered employees who perform certain safety-sensitive functions covered by the pipeline safety regulations.

RSPA has been carefully evaluating the scope of covered functions since implementation of the anti-drug rule in 1990 and believes that the scope remains appropriate and should be proposed for this rule. At this point we are not persuaded that the increased benefit to safety that would accrue by including other functions warrants the imposition of an alcohol testing requirement on individuals performing those functions. However, RSPA is soliciting comment on this issue, with specific focus on the following questions:

1. Are there covered functions the performance of which appears to sufficiently implicate safety to warrant regulating alcohol-related conduct and imposition of a testing requirement?
2. Do pipeline operators have any data on the size of the population that would be affected and the incidence of alcohol misuse by this population?
3. What additional costs would be incurred by inclusion of other functions and what would be the offsetting benefits (*e.g.*, in terms of accident prevention, productivity, employee lost time, etc.)?
4. Does the industry or public have any information on alcohol-related accidents?
5. Are there other ways that RSPA could reduce the burden on small operators?

Regulating Employers Rather Than Employees

RSPA's authority to enforce pipeline safety regulations is directed at the employer and not to the employees. The proposed rules requires employers to develop a program and implement that program in compliance with these regulations. In each case, it is the employer's responsibility and in some cases this means having responsibility for the actions of its safety-sensitive employees and its contractors.

Reasonable Suspicion

RSPA is proposing that a supervisor who makes the determination that reasonable suspicion exists to test a covered employee shall not conduct the breath alcohol test on that employee, if another supervisor is readily available. The purpose of this provision is to protect a covered employee from being unfairly targeted by a supervisor. However, RSPA recognizes that in the pipeline industry situations may occur, particularly in remote areas, where another supervisor is not readily available. In such a situation the supervisor who made the determination, could conduct the alcohol test.

Alcohol Testing Programs

RSPA proposes to include a requirement that employers maintain and follow a written alcohol misuse prevention plan. This process proved beneficial in assisting the industry in establishing programs and educating the industry about the requirements of the drug rule. RSPA will not require employers to submit their alcohol misuse prevention plans for review and approval. However, RSPA is considering development of a drug and alcohol "model" plan. The model plan could be used by employers and contractors that provide services to employers subject to the regulations. RSPA seeks specific comments on whether a model drug and alcohol plan would be beneficial to employers to standardize the requirements of the rules and assist in compliance issues.

Recordkeeping, Reporting, and Confidentiality.

This rule would require employers to maintain detailed records related to

their alcohol misuse prevention programs, including records of alcohol tests performed under this rule. The records would have to be maintained in a secure location and could be released only as required under the rule or with the express written consent of the employee. As proposed in this NPRM, an employee would have the right to receive records pertaining to his or her use of alcohol. The employer would be required to provide the records promptly. In response to concerns raised in the context of drug testing, the rule would prohibit making access to the records contingent on paying for records other than those specifically requested by the employee. RSPA has not addressed payment for those records that are requested by the employee, and believes that this would be an issue that would be determined between the employer and its employees. The rule would also provide for release of all records (including individual alcohol test results) to RSPA or other DOT agency with regulatory authority over the employer or its covered employees, and to the decisionmaker in a lawsuit, grievance, or other proceeding in an action initiated by or on behalf of an individual and arising from the individual's alcohol test or other alcohol misuse.

RSPA is aware that some employers have hesitated to release information related to drug test results to subsequent employers. Under the anti-drug rule, such releases are based on the general permissive authority given to employers to release information upon the written consent of the covered employee. This rule would require the release of employee-specific information to a subsequent employer if the original employer receives a written request from the covered employee. RSPA believes that providing a regulatory mandate for such release and removal of employer discretion would relieve employers' concerns about possible litigation.

The rule would also require operators to provide RSPA access to their facilities to conduct on-site inspections of employer's alcohol programs, including the alcohol testing process. RSPA's experience with compliance monitoring under the anti-drug rule has indicated that the individuals managing employers' programs are frequently persons with human resources or administration backgrounds. These people often have had no experience with other RSPA inspections (*e.g.*, risk-based inspections) and are often unaware of RSPA's authority to conduct such inspections. While the Administrator or his designee has such authority even absent a regulatory provision, RSPA determined that inclusion of such a provision in this rule would be appropriate to ensure industry awareness of RSPA's authority to monitor compliance.

Finally, RSPA believes that reporting of statistical information by employers is an essential tool for monitoring compliance with the rule. RSPA's experience with reports indicates that annual reporting is sufficient to ensure that RSPA can adequately monitor the rule. This NPRM therefore proposes submission of annual statistical data on each operator's drug and alcohol testing program. The drug and alcohol report format is contained in RSPA's Management information system, Notice of proposed rulemaking published elsewhere in today's **Federal Register.**

Contractor Compliance

RSPA believes that contractor employees should be included in the group of employees that must undergo alcohol misuse testing. Although these persons may not be under the direct control of operators, their job performance is no less critical than the performance of employees who work directly for operators. RSPA has limited the employees covered by the alcohol misuse rule to those who perform regulated operation, maintenance, or emergency-response functions, on the pipeline or LNG facility and perform regulated functions under part 192, 193, or 195, which should minimize the effects of the rule on operators who contract for unskilled transient laborers.

Regulatory Analyses and Notices

E.O. 12291 and DOT Regulatory Policies and Procedures

The proposed rule is not major under Executive Order 12291 (46 FR 13193; February 19, 1981). It is significant under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979) because the proposal involves issues of substantial interest to the public.

Paperwork Reduction Act

The reporting and recordkeeping requirements associated with this rule are being submitted to the Office of Management and Budget for approval in accordance with 44 U.S.C. Chapter 35 under DOT No. ; OMB No. ; Administration: Research and Special Programs Administration; *Title:* Alcohol Misuse Prevention Program; *Need for Information:* The information requested is necessary to properly monitor the effectiveness of the program and to ensure compliance with the rule. Statistical data collected will build a data base to determine the continuing need for the rule; *Frequency:* Annual report; *Burden Hours per Respondent:* RSPA has estimated that the recordkeeping and reporting burden hours per operator would be 17 hours (4 hours for annual reports and 13 hours for recordkeeping). For further information contact: The Information Requirements Division, M–34, Office of the Secretary of Transportation, 400 Seventh Street, SW., Washington, DC 20590, (202) 366–4735 or Edward Clarke, Office of Management and Budget, New Executive Office Building, room 3228, Washington, DC 20503, (202) 395–7340.

Regulatory Flexibility Act

The proposed rule affects all entities subject to part 192 (other than operators of master meter systems), 193, or 195. Operators of master meter systems constitute the bulk of small businesses or other small entities that operate gas pipeline systems subject to part 192. There are few, if any, small entities that operate hazardous liquid or carbon dioxide pipelines subject to part 195, or LNG facilities subject to part 193. Therefore, I certify under section 605 of the Regulatory Flexibility Act (5 U.S.C. 605) that this proposed rule would not, if adopted as final, have a significant economic impact on a substantial number of small entities.

E.O. 12612

The proposed rulemaking action would not have substantial direct effects on states, on the relationship between the Federal Government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612 (52 FR 41685; October 30, 1987), RSPA has determined that this notice does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

List of Subjects in 49 CFR Part 199

Alcohol testing, Drug testing, Pipeline safety, Reporting and recordkeeping requirements, Safety, and Transportation.

In consideration of the foregoing, RSPA proposes to amend 49 CFR part 199 as follows:

1. The heading of part 199 is proposed to be revised to read as follows:

PART 199—ANTI-DRUG AND ALCOHOL MISUSE PREVENTION PROGRAMS

2. The authority citation for part 199 is proposed to be revised to read as follows:

Authority: 49 App. U.S.C. 1672, 1674a, 1681, 1804, 1808, and 2002; 49 CFR 1.53.

§§ 199.1 through 199.23 [Redesignated as Subpart A]

3. Part 199 is proposed to be amended by redesignating §§ 199.1 through 199.23 as a new subpart A entitled Anti-Drug Program.

4. Part 199 is proposed to be amended by adding a new subpart B as set forth below:

Subpart B—Alcohol Misuse Prevention Program

Sec.

199.200 Purpose.
199.201 Applicability.
199.202 Alcohol misuse plan.
199.203 Alcohol testing procedures.
199.205 Definitions.
199.207 Preemption of State and local laws.
199.209 Other requirements imposed by operators.
199.211 Requirement for notice.
199.213 Starting date for alcohol testing programs.
199.215 Alcohol concentration.
199.217 Behavior and appearance.
199.219 On-duty use.
199.221 Pre-duty use.
199.223 Use following an accident.
199.225 Refusal to submit to a required alcohol test.
199.227 Alcohol tests required.
199.229 Retention of records.
199.231 Reporting of results in a management information system.
199.233 Access to facilities and records.
199.235 Removal from safety-sensitive function.
199.237 Required evaluation and testing.
199.239 Other alcohol-related conduct.
199.241 Operator obligation to promulgate a policy on the misuse of alcohol.
199.243 Training for supervisors.
199.245 Referral, evaluation, and treatment.
199.247 Contractor employees.

Subpart B—Alcohol Misuse Prevention Program

§ 199.200 Purpose.

The purpose of this subpart is to establish programs designed to help prevent accidents and injuries resulting from the misuse of alcohol by employees who perform safety-sensitive functions for operators of pipeline facilities subject to part 192, 193, or 195 of this chapter.

§ 199.201 Applicability.

This subpart applies to gas, hazardous liquid and carbon dioxide pipeline operators and liquefied natural gas operators subject to part 192, 193, or 195 of this chapter. However, this subpart does not apply to operators of master meter systems defined in § 191.3 of this chapter.

§ 199.202 Alcohol misuse plan.

Each operator shall maintain and follow a written alcohol misuse plan that conforms to the requirements of this subpart and the DOT procedures. The plan shall contain methods and procedures for compliance with all the requirements of this subpart, including required education and training elements.

§ 199.203 Alcohol testing procedures.

Each operator shall ensure that all alcohol testing conducted under this subpart complies with the procedures set forth in part 40 of this title. The provisions of part 40 of this title that address alcohol testing are made applicable to operators by this subpart.

§ 199.205 Definitions.

As used in this subpart:

Accident means an incident reportable under part 191 of this chapter involving gas pipeline facilities or LNG facilities, or an accident reportable under part 195 of this chapter involving hazardous liquid or carbon dioxide pipeline facilities.

Administrator means the Administrator of the Research and Special Programs Administration (RSPA), or any person who has been delegated authority in the matter concerned.

Alcohol means ethyl alcohol (ethanol).

Alcohol concentration (or content) means the alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by an evidential breath test under this subpart. When the indicated alcohol concentration of a covered employee on an initial alcohol test is different from an indicated alcohol concentration on a confirmatory test, the employee shall be considered to have the lower indicated concentration.

Alcohol use means the consumption of any beverage, mixture, or preparation, including any medication, containing alcohol.

Confirmatory test means a second analytical procedure, separate from the screening test, to determine the concentration of alcohol in a covered employee's system. The confirmatory test may or may not use a different chemical principle from that of the screening test, but shall employ a scientifically recognized method of testing capable of providing quantitative data regarding alcohol concentration. For specific requirements concerning evidential breath testing devices see part 40 of this title.

Consortium means an entity, including a group or association of employers, recipients, or contractors, that provides alcohol testing as required by this subpart or other DOT alcohol testing rules and that acts on behalf of the operators.

Covered employee means a person who performs on a pipeline or at an LNG facility an operating, maintenance, or emergency-response function regulated by part 192, 193, or 195 of this chapter. As used in this part, *employee* includes an applicant for employment. *Covered employee* and *individual* or *individual to be tested* have the same meaning for the purposes of this subpart. The term *covered employee* does not include clerical, truck driving, accounting, or other functions not subject to part 192, 193, or 195. The person may be employed by the operator, be a contractor engaged by the operator, or be employed by such a contractor. For the purposes of pre-employment/pre-duty testing only, the term covered employee includes a person applying to perform a safety-sensitive function.

DOT agency means an agency (or *operating administration*) of the United States Department of Transportation administering regulations requiring alcohol testing (14 CFR part 61, 49 CFR parts 199, 219, 382, and 654) in accordance with part 40 of this title.

Employer or operator means a person who owns or operates a pipeline or LNG facility subject to part 192, 193, or 195 of this chapter.

Initial alcohol test (or screening test) means an analytical procedure to determine whether a covered employee may have a prohibited concentration of alcohol in his or her system.

Performing (a safety-sensitive function): An employee is considered to be performing a safety-sensitive function during any period in which he or she is actually performing, ready to perform, or immediately available to perform such covered functions.

Refuse to submit (to an alcohol test) means that a covered employee fails to provide adequate breath for testing without a valid medical explanation after he or she has received notice of the requirement to be tested in accordance with the provisions of part 199 of this chapter and part 40 of this title or engages in conduct that clearly obstructs the collection process.

Safety-sensitive function means an operation, maintenance, or emergency-response function that is performed on

a pipeline or LNG facility and the function is regulated by part 192, 193, or 195.

State agency means an agency of any of the several states, the District of Columbia, or Puerto Rico that participates under section 5 of the Natural Gas Pipeline Safety Act of 1968 (49 App. U.S.C. 1674) or section 205 of the Hazardous Liquid Pipeline Safety Act of 1979 (49 App. U.S.C. 2009).

Substance abuse professional means a licensed physician (Medical Doctor or Doctor of Osteopathy), or a licensed or certified psychologist, social worker, or employee assistance professional with knowledge of and clinical experience in the diagnosis and treatment of alcohol-related disorders.

§ 199.207 Preemption of State and local laws.

(a) Except as provided in paragraph (b) of this section, this subpart preempts any State or local law, rule, regulation, or order to the extent that:

(1) Compliance with both the State or local requirement and this subpart is not possible;

(2) Compliance with the State or local requirement is an obstacle to the accomplishment and execution of any requirement in this subpart; or

(3) The State or local requirement is a pipeline safety standard applicable to interstate pipeline facilities.

(b) This subpart shall not be construed to pre-empt provisions of State criminal law that impose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property, whether the provisions apply specifically to transportation employees or employers or to the general public.

§ 199.209 Other requirements imposed by operators.

Except as expressly provided in this subpart, nothing in this subpart shall be construed to affect the authority of operators, or the rights of employees, with respect to the use or possession of alcohol, including authority and rights with respect to alcohol testing and rehabilitation.

§ 199.211 Requirement for notice.

Before performing an alcohol test under this subpart, each operator shall notify a covered employee that the alcohol test is required by this subpart. No operator shall falsely represent that a test is administered under this subpart.

§ 199.213 Starting date for alcohol testing programs.

(a) *Large operators.* Each operator with more than fifty covered employees on [*the effective date of the final rule*] shall implement the requirements of this subpart on [*date one year after the effective date of the final rule*].

(b) *Small operators.* Each operator with fifty or fewer covered employees on [*effective date of the final rule*] shall implement the requirements of this subpart on [*date two years after the effective date of the final rule*].

(c) All operators shall have an alcohol misuse program that conforms to this subpart by [*date two years after the effective date of the final rule*], or by the date an operator begins operations, whichever is later.

§ 199.215 Alcohol concentration.

No operator shall allow a covered employee to report for duty or remain on duty requiring the performance of safety-sensitive functions while having an alcohol concentration of .04 or greater. No operator having actual knowledge that a covered employee has an alcohol concentration of .04 or greater shall permit the employee to perform or continue to perform safety-sensitive functions.

§ 199.217 Behavior and appearance.

Notwithstanding the absence of a reasonable suspicion test under § 199.227(d), no operator having actual knowledge that a covered employee's behavior or appearance is characteristic of alcohol misuse or that the covered employee's ability to perform his or her assigned functions is adversely affected by alcohol use shall permit the covered employee to report for duty or remain on duty requiring the performance of safety-sensitive functions. Each operator shall prohibit a covered employee whose behavior or appearance is characteristic of alcohol misuse or whose ability to perform his or her assigned functions is adversely affected by alcohol from reporting for duty or remaining on duty requiring the performance of safety-sensitive functions.

§ 199.219 On-duty use.

Each operator shall prohibit a covered employee from using alcohol while performing safety-sensitive functions. No operator having actual knowledge that a covered employee is using alcohol while performing safety-sensitive functions shall permit the employee to perform or continue to perform safety-sensitive functions.

§ 199.221 Pre-duty use.

Each operator shall prohibit a covered employee from using alcohol within four hours prior to performing safety-sensitive functions. No operator having actual knowledge that a covered employee has used alcohol within four hours prior to performing safety-sensitive functions shall permit a covered employee to perform or continue to perform safety-sensitive functions.

§ 199.223 Use following an accident.

No operator shall permit a covered employee who has actual knowledge of an accident in which his or her performance of safety-sensitive functions has not been discounted by the operator as a contributing factor to an accident shall use alcohol for eight hours following the accident, unless he or she has been given a post-accident test under § 199.227(b), or the operator has determined that the employee's performance could not have contributed to the accident.

§ 199.225 Refusal to submit to a required alcohol test.

Each operator shall require a covered employee to submit to a post-accident alcohol test required under § 199.227(b), a random alcohol test required under § 199.227(c), a reasonable suspicion alcohol test required under § 199.227(d), or a follow-up alcohol test required under § 199.227(e). No operator shall permit an employee who refuses to submit to such a test to perform or continue to perform safety-sensitive functions.

§ 199.227 Alcohol tests required.

Each operator shall conduct the following types of alcohol tests for the presence of alcohol:

(a) *Pre-employment/pre-duty testing.* (1) Prior to the first time a covered employee performs safety-sensitive functions for an operator, the operator shall ensure that the employee undergoes testing for alcohol. No operator shall allow a covered employee to perform safety-sensitive functions, unless the employee has been administered an alcohol test with a result indicating an alcohol concentration less than .04. If a pre-employment/pre-duty test result under this section indicates an alcohol content of .02 or greater but less than .04, the provisions of § 199.239 shall apply.

(2) An operator is not required to administer an alcohol test required by paragraph (1) of this section, if:

(i) The employee has undergone an alcohol test required by this section or the alcohol misuse regulations of another DOT agency under part 40 of this title within the previous six months, with a result indicating an alcohol concentration less than .04; and

(ii) The operator ensures that no prior operator of the covered employee of

whom the operator has knowledge has records of a violation of this subpart or the alcohol misuse regulations of another DOT agency within the previous six months.

(b) *Post-accident.* (1) As soon as practicable following an accident, each operator shall test each surviving covered employee for alcohol if that employee's performance of a safety-sensitive function either contributed to an accident or cannot be completely discounted as a contributing factor to the accident. The decision not to administer a test under this section shall be based on the operator's determination, using the best available information at the time of the determination, that the covered employee's performance could not have contributed to the accident.

(2) If a test required by this section is not administered within two hours following the accident, the operator shall submit a report to the appropriate Regional Office of Pipeline Safety stating the reasons the test was not promptly administered. If a test required by this paragraph (b) is not administered within eight hours following the accident, the operator shall cease attempts to administer an alcohol test and shall submit the same report.

(3) A covered employee who is subject to post-accident testing who leaves the scene of an accident without a valid reason prior to submission to such test may be deemed by the operator to have refused to submit to testing. Nothing in this section shall be construed to require the delay of necessary medical attention for injured people following an accident or to prohibit a covered employee from leaving the scene of an accident for the period necessary to obtain assistance in responding to the accident or to obtain necessary emergency medical care.

(c) *Random testing.* (1) Each operator shall, at various times, randomly select employees for unannounced alcohol testing. The selection of employees shall be made by use of a scientifically valid method, such as a random-number table or a computer-based random number generator that is matched with employees' Social Security numbers, payroll identification numbers, or other comparable identifying numbers. Each covered employee shall have an equal chance of being tested under the selection process used.

(2) During each 12-month period following the start of random alcohol testing by the operator, the operator shall meet the following conditions:

(i) The dates for administering unannounced testing of randomly-selected covered employees shall be spread reasonably throughout the 12-month period; and

(ii) The number of employees randomly selected for testing during the 12-month period shall equal an annual rate of not less than [10–50] percent of the total number of employees subject to alcohol testing under this subpart or the alcohol misuse regulations of another DOT agency. If the operator conducts random testing through a consortium, the annual rate may be calculated for each individual operator or for the total number of covered employees subject to random testing by the consortium.

(3) A covered employee shall only be tested while the employee is performing safety-sensitive functions; just before the employee is to perform safety-sensitive functions; or just after the employee has ceased performing such functions.

(4) Each operator shall require that each covered employee who is notified of selection for random testing proceeds to the testing site immediately. However, if the employee is performing a safety-sensitive function at the time of the notification, the operator shall instead ensure that the employee ceases to perform the safety-sensitive function and proceeds to the testing site as soon as possible.

(d) *Testing based on reasonable suspicion.* (1) Each operator shall require any covered employee to submit to an alcohol test when the operator has reasonable suspicion to believe that the employee has violated the prohibitions in this subpart.

(2) The operator's determination that reasonable suspicion exists to require the employee to undergo an alcohol test shall be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odors of the employee. The required observations shall be made by a supervisor who is trained in detecting the symptoms of alcohol misuse. The supervisor who makes the determination that reasonable suspicion exists shall not conduct the breath alcohol test on that employee, if another supervisor is readily available.

(3) Alcohol testing is authorized by this section only if the observations required by paragraph (d)(2) of this section are made during or just preceding the period of the work day that the employee is required to be in compliance with this subpart. A covered employee may be required to undergo reasonable suspicion testing for alcohol while the employee is performing safety-sensitive functions; just before the employee is to perform safety-sensitive functions; or just after the employee has ceased performing such functions.

(e) *Return-to-duty testing.* Each operator shall ensure that before a covered employee returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited by §§ 199.215–199.225, the employee shall undergo a return-to-duty alcohol test with a result indicating an alcohol concentration of less than .02.

(f) *Follow-up testing.* Following a determination under § 199.245(b) that a covered employee is in need of assistance in resolving problems associated with alcohol misuse, each operator shall ensure that the employee is subject to unannounced follow-up alcohol testing as directed by a substance abuse professional in accordance with the provisions of § 199.245(c)(2)(ii).

(g) *Retesting of covered employees with an alcohol concentration of .02 or greater but less than .04.* Each operator shall retest a covered employee to ensure compliance with the provisions of § 199.239, if the operator chooses to permit the employee to perform a safety-sensitive function within eight hours following the administration of an alcohol test indicating an alcohol concentration of .02 or greater but less than .04.

§ 199.229 Retention of records.

(a) *General requirement.* Each operator shall maintain records of its alcohol misuse prevention program as provided in this section. The records shall be maintained in a secure location with controlled access.

(b) *Period of retention.* Each operator shall maintain the records in accordance with the following schedule:

(1) *Five years.* Records of employee alcohol test results with results indicating an alcohol concentration of .02 or greater, documentation of refusals to take required alcohol tests, calibration documentation, and employee evaluation and referrals shall be maintained for a minimum of five years.

(2) *Two years.* Records related to the collection process (except calibration of evidential breath testing devices) and training shall be maintained for a minimum of two years.

(3) *One year.* Records of negative test results (as defined in 49 CFR part 40) shall be maintained for a minimum of one year.

(c) *Types of records.* The following specific records shall be maintained.

(1) *Records related to the collection process:* (i) Collection logbooks, if used.

(ii) Documents relating to the random selection process.

(iii) Calibration documentation for evidential breath testing devices.

(iv) Verification of breath alcohol technician training.

(v) Documents generated in connection with decisions to administer reasonable suspicion alcohol tests.

(vi) Documents generated in connection with decisions on post-accident tests.

(vii) Documents verifying existence of a medical explanation of the inability of a covered employee to provide adequate breath for testing.

(2) *Records related to test results:* (i) The operator's copy of the alcohol test form, including the results of the test.

(ii) Documents related to the refusal of any covered employee to submit to an alcohol test required by this subpart.

(iii) Documents presented by a covered employee to dispute the result of an alcohol test administered under this subpart.

(3) *Records related to other violations of this subpart.*

(4) *Records related to evaluations:* (i) Records pertaining to a determination by a substance abuse professional concerning a covered employee's need for assistance.

(ii) Records concerning a covered employee's compliance with the recommendations of the substance abuse professional.

(5) *Records related to education and training:* (i) Materials on alcohol misuse awareness, including a copy of the operator's policy on alcohol misuse.

(ii) Documentation of compliance with the requirements of § 199.233.

(iii) Documentation of training provided to supervisors for the purpose of qualifying the supervisors to make a determination concerning the need for alcohol testing based on reasonable suspicion.

(iv) Certification that any training conducted under this subpart complies with the requirements for such training.

§ 199.231 Reporting of results in a management information system.

(a) Each operator shall submit to RSPA an annual report covering the calendar year, summarizing the results of its alcohol misuse prevention program.

(b) Each operator that is subject to more than one DOT agency alcohol regulation shall identify each employee covered by the regulations of more than one DOT agency. The identification will be by the total number and category of covered function. Prior to conducting any alcohol test on a covered employee subject to the regulations of more than one DOT agency, the employer shall determine which DOT agency rule or rules authorizes or requires the test. The test result information shall be directed to the appropriate DOT agency or agencies.

(c) Each operator shall ensure the accuracy and timeliness of each report submitted by the operator or a consortium.

(d) Each operator shall submit the required annual reports no later than February 15 of each year. The report shall be submitted on the form specified by RSPA. Each report shall contain:

(1) Number of covered employees by employee category.

(2) Number of covered employees in each category subject to testing under the alcohol misuse regulations of another DOT agency, identified by each agency.

(3) (i) Number of initial tests by type of test and employee category.

(ii) Number of confirmatory tests, by type of test and employee category.

(4) Number of confirmatory alcohol tests indicating an alcohol concentration of .04 or greater, by type of test and employee category.

(5) Number of confirmatory alcohol tests indicating an alcohol concentration of .02 or greater but less than .04, by type of test and employee category.

(6) Number of persons denied a position as a covered employee following a pre-employment/pre-duty alcohol test indicating an alcohol concentration of .04 or greater.

(7) Number of covered employees with a confirmatory alcohol test indicating an alcohol concentration of .04 or greater who were returned to duty in covered positions (having complied with the recommendations of a substance abuse professional as described in §§ 199.237 and 199.245).

(8) Number of covered employees who were administered alcohol and drug tests at the same time, with both a positive drug test and an alcohol test indicating an alcohol concentration of .04 or greater.

(9) Number of covered employees who were found to have violated other provisions of § § 199.215–199.225, and the action taken in response to the violation.

(10) Number of covered employees who refused to submit to an alcohol test required under this subpart, and the action taken in response to the refusal.

(11) Number of supervisors who have received training during the reporting period in determining the existence of reasonable suspicion of alcohol misuse.

§ 199.233 Access to facilities and records.

(a) Except as required by law or expressly authorized or required in this subpart, no employer shall release covered employee information that is contained in records required to be maintained in § 199.229.

(b) A covered employee is entitled, upon written request, to obtain copies of any records pertaining to the employee's use of alcohol, including any records pertaining to his or her alcohol tests. The operator shall promptly provide the records requested by the employee. Access to an employee's records shall not be contingent upon payment for records other than those specifically requested.

(c) Each operator shall permit access to all facilities utilized in complying with the requirements of this subpart to the Secretary of Transportation or any DOT agency with regulatory authority over the operator or any of its covered employees.

(d) Each operator shall make available copies of all results for operator alcohol testing conducted under this subpart and any other information pertaining to the operator's alcohol misuse prevention program, when requested by the Secretary of Transportation or any DOT agency with regulatory authority over the operator or covered employee.

(e) When requested by the National Transportation Safety Board as part of an accident investigation, operators shall disclose information related to the operator's administration of a post-accident alcohol test administered following the accident under investigation.

(f) Records shall be made available to a subsequent employer upon receipt of written request from the covered employee. Disclosure by the subsequent employer is permitted only as expressly authorized by the terms of the employee's request.

(g) An operator may disclose information required to be maintained under this subpart pertaining to a covered employee to the employee or the decisionmaker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the individual, and arising from the results of an alcohol test administered under this subpart, or from the operator's determination that the covered employee engaged in conduct prohibited by §§ 199.215–199.225 (including, but not limited to, a worker's compensation, unemployment compensation, or other proceeding relating to a benefit sought by the employee.)

(h) An operator shall release information regarding a covered employee's records as directed by the specific, written consent of the employee authorizing release of the information to an identified person.

Release of such information by the person receiving the information is permitted only in accordance with the terms of the employee's consent.

§ 199.235 Removal from safety-sensitive function.

Except as provided in §§ 199.241–199.245, no operator shall permit any covered employee to perform safety-sensitive functions if the employee has engaged in conduct prohibited by §§ 199.215–199.225 or alcohol misuse regulations of another DOT agency.

§ 199.237 Required evaluation and testing.

No operator shall permit a covered employee who has engaged in conduct prohibited by §§ 199.215–199.225 to perform safety-sensitive functions unless the employee has met the requirements of § 199.245. Nothing in this section shall be construed to prohibit the continued performance of safety-sensitive functions necessary to respond to an emergency.

§ 199.239 Other alcohol-related conduct.

(a) No operator shall permit a covered employee tested under the provisions of § 199.227, who is found to have an alcohol concentration of .02 or greater but less than .04, to perform or continue to perform safety-sensitive functions, until:

(1) The employee's alcohol concentration measures less than .02; or

(2) The start of the employee's next regularly scheduled duty period, but not less than eight hours following administration of the test.

(b) Except as provided in paragraph (a)(1) of this section, no operator shall take any action under this subpart against an employee based solely on test results showing an alcohol concentration less than .04. This does not prohibit an operator with authority independent of this subpart from taking any action otherwise consistent with law.

(c) Nothing in this section shall be construed to prohibit the continued performance of safety-sensitive functions necessary to respond to an emergency.

§ 199.241 Operator obligation to promulgate a policy on the misuse of alcohol.

(a) *General requirements.* Each operator shall provide educational materials that explain the requirements of this subpart and the employer's policies and procedures with respect to meeting those requirements. Each employer shall provide written notice to every covered employee and to representatives of employee organizations of the availability of this information.

(b) *Required content.* The materials to be made available to covered employees shall include detailed discussion of at least the following:

(1) The identity of the person designated by the operator to answer covered employee questions about the materials.

(2) The categories of employees who are subject to the provisions of this subpart.

(3) Sufficient information about the safety-sensitive functions performed by those employees to make clear what period of the work day the covered employee is required to be in compliance with this subpart.

(4) Specific information concerning covered employee conduct that is prohibited by this subpart.

(5) The circumstances under which a covered employee will be tested for alcohol under this subpart.

(6) The procedures that will be used to test for the presence of alcohol, protect the covered employee and the integrity of the breath testing process, safeguard the validity of the test results, and ensure that those results are attributed to the correct employee.

(7) The requirement that a covered employee submit to alcohol tests administered in accordance with this subpart.

(8) An explanation of what constitutes a refusal to submit to an alcohol test and the attendant consequences.

(9) The consequences for covered employees found to have violated this subpart, including the requirement that the employee be removed immediately from safety-sensitive functions, and the procedures under § 199.245.

(10) The consequences for covered employees found to have an alcohol concentration of .02 or greater but less than .04.

(c) *Optional provisions.* The materials supplied to covered employees may also include information on additional operator policies with respect to the use or possession of alcohol, including any consequences for an employee found to have a specified alcohol level, that are based on the operator's authority independent of this subpart. Any such additional policies or consequences shall be clearly and obviously described as being based on independent authority.

§ 199.243 Training for supervisors.

Each operator shall ensure that persons designated to determine whether reasonable suspicion exists to require a covered employee to undergo alcohol testing under § 199.227(d) receive at least 60 minutes of training on the physical, behavioral, speech, and performance indicators of probable alcohol misuse.

§ 199.245 Referral, evaluation, and treatment.

(a) Each operator shall ensure that a covered employee who engages in conduct prohibited under §§ 199.215–199.225 shall be advised of the resources available to the covered employee in evaluating and resolving problems associated with the misuse of alcohol, including the names, addresses, and telephone numbers of substance abuse professionals and counseling and treatment programs.

(b) Each covered employee who engages in conduct prohibited by §§ 199.215–199.225 shall be evaluated by a substance abuse professional who shall determine what assistance, if any, the employee needs in resolving problems associated with alcohol misuse.

(c)(1) Before a covered employee returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited by §§ 199.215–199.225, the employee shall undergo a return-to-duty alcohol test with a result indicating an alcohol concentration of less than .02.

(2) In addition, each covered employee identified as needing assistance in resolving problems associated with alcohol misuse—

(i) Shall be evaluated by a substance abuse professional to determine that the employee has properly followed any rehabilitation program prescribed under paragraph (b) of this section, and

(ii) Shall be subject to unannounced follow-up alcohol tests administered by the operator following the employee's return to duty. The number and frequency of such follow-up testing shall be determined by a substance abuse professional, but shall consist of at least six tests in the first 12 months following the employee's return to duty. Follow-up testing shall not exceed 60 months from the date of the employee's return to duty. The substance abuse professional may terminate the requirement for follow-up testing at any time after the first six tests have been administered, if the substance abuse professional determines that such testing is no longer necessary.

(d) Evaluation and rehabilitation may be provided by the operator, by a substance abuse professional under contract with the operator, or by a substance abuse professional not affiliated with the operator. The choice of substance abuse professional and assignment of costs shall be made in

accordance with operator/employee agreements and employer policies.

(e)(1) The provisions of this paragraph (e) apply if the policy of the operator permits reinstatement of an employee who has violated the provisions of this subpart.

(2) The operator shall designate a substance abuse professional to evaluate—

(i) The needs of the employee with respect to rehabilitation services such as counseling or treatment; and

(ii) Where rehabilitation services are required, the progress of the employee in establishing control over any substance abuse disorder before return to a safety-sensitive function. In deciding whether and under what conditions the employee is able to return to a safety-sensitive function, the substance abuse professional acts as the agent of the operator.

(3) At the operator's discretion, the designated substance abuse professional may be a salaried employee (e.g., an employee assistance counselor), a contractor, or a member of the staff of an otherwise unaffiliated health care provider.

(4) Nothing in this subpart shall be construed to determine the responsibility of the operator, employee, health insurance carrier or other person to bear the costs of substances abuse evaluation or rehabilitation services. Nothing in this subpart shall be construed to abridge existing agreements or policies with respect to payment or reimbursement of such costs.

§ 199.247 Contractor employees.

(a) With respect to those covered employees who are contractors or employed by a contractor, an operator may provide by contract that the alcohol testing, training and education required by this subpart be carried out by the contractor provided:

(b) The operator remains responsible for ensuring that the requirements of this subpart and part 40 of this title are complied with; and

(c) The contractor allows access to property and records by the operator, the Administrator, DOT agency with regulatory authority over the operator or covered employee, and if the operator is subject to the jurisdiction of a state agency, a representative of the state agency for the purposes of monitoring the employer's compliance with the requirements of this subpart and part 40 of this title.

Issued in Washington, DC, on December 2, 1992.

Andrew H. Card, Jr.,

Secretary of Transportation.

Douglas B. Ham,

Acting Administrator, Research and Special Programs Administration.

[FR Doc. 92–29687 Filed 12–10–92; 10:00 am]

BILLING CODE 4910–60–M

Research and Special Programs Administration

49 CFR Part 199

[Docket No. PS–129; Notice No. 1]

RIN 2137–AB95

Drug Testing: MIS Standardized Data Collection and Reporting

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: Today's Federal Register contains a notice of proposed rulemaking issued by the Department of Transportation regarding the collection and reporting of drug and alcohol testing data. The Department's proposed rule concerns a DOT plan to measure the effectiveness of drug testing programs in all DOT-regulated modes of transportation, including pipeline. The present RSPA notice proposes a rule that is necessary to carry out the DOT plan with respect to pipeline operators. Together, the two proposed rules would require pipeline operators who are subject to drug and alcohol testing requirements to report annually to RSPA certain information about their drug and alcohol testing programs. RSPA would use the data to analyze its current approach to deterring and detecting illegal drug and alcohol misuse use in the pipeline industry, and, as appropriate, plan a more efficient and effective approach.

Elsewhere in today's Federal Register is the parallel "MIS" NPRM regarding 49 CFR part 40. The preamble to that NPRM contains many comments, discussions and questions that should be considered in reviewing this Operating Administration NPRM. Your comments on this NPRM should indicate that you are responding to questions or comments in the generic NPRM under 49 CFR part 40 or the specific NPRM under this Operating Administration rule.

DATES: Comments should be received by April 14, 1993. Late-filed comments will be considered to the extent practicable. Comments on the Secretary's notice appearing elsewhere in today's Federal Register should be submitted as directed by that notice.

ADDRESSES: Send comments on this notice in duplicate to the Dockets Unit, room 8421, Research and Special Programs Administration, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001. Identify the docket and notice numbers stated in the heading of this notice. All comments and other docketed material will be available for inspection and copying in room 8421 between the hours of 8:30 a.m. and 5 p.m. each working day.

FOR FURTHER INFORMATION CONTACT: Mr. Richard L. Rippert, Office of Pipeline Safety Enforcement, RSPA, DOT, 400 7th Street, SW., Washington, DC 20590–0001 (202) 366–6223.

SUPPLEMENTARY INFORMATION:

Background

On November 21, 1988, RSPA published final drug testing rules (53 FR 47084). The rules are codified in 49 CFR part 199. These rules require each operator of pipelines or liquefied natural gas facilities used in the transportation of gas subject to 49 CFR part 192 or 193 (except master meter systems) or the transportation of hazardous liquids subject to 49 CFR part 195 to implement a drug testing program for specific categories of employees. The programs apply to employees that perform operation, maintenance, or emergency-response functions on pipelines or liquefied natural gas facilities.

DOT's Office of Drug Enforcement and Program Compliance oversees drug policies and programs for the Secretary of Transportation. That office created a working group with representatives from the operating administrations to develop a comprehensive plan for a Management Information System (MIS) to obtain and analyze employer drug and alcohol testing data. Two of the operating administrations currently have reporting requirements in their regulations. The MIS system is designed to measure the effectiveness of the drug and alcohol testing programs in each mode of transportation. The MIS plan identified standard data elements that are critical to the review and management of the RSPA drug and alcohol program. The data would be the basis for monitoring implementation and addressing compliance and enforcement issues and evaluating the overall effectiveness of the operators' drug and alcohol testing programs.

To begin the administrative process necessary to collect these data, the

Department of Transportation has issued a notice of proposed rulemaking. The notice is published in today's **Federal Register** as a proposed amendment to the regulations of the Office of the Secretary. The Department's notice proposes to add an information collection requirement to 49 CFR part 40, as § 40.41. Under the Department's proposed rule, pipeline operators subject to part 199 would have to submit certain drug and alcohol testing data to RSPA annually in accordance with a rule we are proposing in the present notice. Operators would maintain data on a calendar-year basis (closing date of December 31) and the report would be required to be submitted to RSPA by February 15 of the following year. The report would be required to contain certain data elements that are outlined under the proposed § 40.41 in the Department's notice.

Operators with employees who fall under two or more DOT agency regulations requiring drug testing must submit data to each agency for those employees covered by that agency rule. Employees who perform functions covered by more than one agency should be identified by the operator as to which covered function they will be reported under. Drug and alcohol testing data on dual covered employees should be reported to RSPA and any other appropriate agency.

As set forth below, we are proposing to revise § 199.23, concerning recordkeeping, and add a new § 199.25 to part 199 to implement the Department's proposed information collection requirements. Although the proposed § 40.41 allows RSPA to amend the reporting form to collect additional or modified data, RSPA is not proposing to deviate from DOT's format at this time. RSPA is proposing further instructions for two items on the form that would apply to pipeline operators when submitting their drug and alcohol testing data. RSPA has provided a sample report format as an appendix, which is RSPA specific, in the NPRM.

If the Department's proposed amendment to part 40 becomes final, it would require pipeline operators to submit data regarding the testing of certain contractors or contractor personnel. Many contractors conduct their own drug and alcohol testing programs or participate in drug testing consortia. RSPA is concerned about any potential difficulties in collecting information from contractors or consortia. Do pipeline operators foresee any difficulties in collecting the appropriate information on contractor employees or from consortia covering contractor employees, in order to comply with the proposed regulations? RSPA is considering whether to defer for the first year the requirement that pipeline operators report information on contractor employees regarding their drug and alcohol testing results. RSPA is concerned about multiple reports of identical information from contractors being submitted by the various pipeline operators for whom the contractor may perform services covered under the regulations. Would these difficulties, if any, create a hardship in meeting the proposed rule or the expected compliance deadline of February 15, 1994, with respect to contractors or consortia?

In accordance with § 199.1(a), part 199 does not apply to master meter systems. However, part 199 applies to operators of petroleum gas systems to which part 192 applies (See § 192.11). Many operators of petroleum gas systems operate more than one such system or the operators are small entities. Do operators of petroleum gas systems, subject to part 199, foresee any difficulties in their operations that may hinder compliance with the proposed rule? In accordance with Section 211 of the Pipeline Safety Reauthorization Act of 1988 (Pub. L. 100–561), RSPA has recently extended the part 195 regulations to cover certain high pressure pipelines used in the transportation of carbon dioxide (56 FR 26922; June 12, 1991). Those pipeline operators will have to implement a drug and alcohol testing program under part 199. Therefore, these operators are affected by the final rule to collect data about operator drug and alcohol testing programs. Do carbon dioxide pipeline operators foresee any difficulties in their operations that may hinder their compliance with this rule?

RSPA is proposing to revise some of the recordkeeping requirements contained in § 199.23(a)(2) to avoid duplicative information collection requirements. Section 199.23(a)(2) requires operators to keep certain records on employees who failed a drug test, including the type of test failed and records that demonstrate rehabilitation, if any. The required information includes (i) The functions performed by the employee, (ii) The prohibited drug(s) used, (iii) Disposition of the employee, and (iv) The age of the employee. The new MIS Annual Reporting System in 49 CFR 40.41 would require operators to maintain and report the information currently required in items (i)–(iii), as well as the type of test failed. RSPA is proposing to eliminate from recordkeeping or reporting requirements the fourth item, concerning the age of each employee who failed a drug test. RSPA does not believe this is an essential data element.

Regulatory Analyses and Notices

E.O. 12291 and DOT Regulatory Policies and Procedures

The proposed rule is not major under Executive Order 12291 (46 FR 13193; February 19, 1981). It is significant under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). The rule proposed by this notice merely implements an amendment the Department is proposing to part 40. The Department has concluded that the proposed amendment to part 40 would cause minimal change in the existing compliance burden and cost of the anti-drug programs affected by the amendment. Therefore, we have not further evaluated the costs and benefits of this proposed rule.

Paperwork Reduction Act

This notice proposes new information collection requirements. These requirements will be submitted to the Office of Management and Budget (OMB) for approval under the Paperwork Reduction Act of 1980 (44 U.S.C. Chap. 35) and 5 CFR part 1320. RSPA estimates the reporting burden for the collection requirement will average 5½ hours per operator for drug testing data and approximately 4 hours for alcohol testing data. This estimate includes time for reviewing instructions, searching existing records, and completing and reviewing the collection of information.

Comments regarding this burden estimate or any other aspect of this information collection requirement, including suggestions for reducing this burden, should be sent to Desk Officer, Research and Special Programs Administration, Office of Information and Regulatory Affairs, Office of Management and Budget, 728 Jackson Place, NW., Washington, DC 20503. Persons submitting comments to OMB are requested to submit a copy of their comments to RSPA as stated above under the **ADDRESSES** section of this preamble.

Regulatory Flexibility Act

The proposed rule affects all entities subject to part 192 (other than operators of master meter systems), 193, or 195, and operators of carbon dioxide pipelines covered by Docket PS–112. Operators of master meter systems constitute the bulk of small businesses or other small entities that operate gas pipeline systems subject to part 192. There are few, if any, small entities that

operate hazardous liquid or carbon dioxide pipelines subject to part 195, or LNG facilities subject to part 193. Therefore, I certify under Section 605 of the Regulatory Flexibility Act (5 U.S.C. 605) that this proposed rule would not, if adopted as final, have a significant economic impact on a substantial number of small entities.

Executive Order 12612

The proposed rulemaking action would not have substantial direct effects on states, on the relationship between the Federal Government and the states, or on the distribution of power and responsibilities among the various levels of Government. Therefore, in accordance with Executive Order 12612 (52 FR 41685; October 30, 1987), RSPA has determined that this notice does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

List of Subjects in 49 CFR Part 99

Pipeline safety, Drug testing, Recordkeeping and reporting.

In consideration of the foregoing, RSPA proposes to amend 49 CFR part 199 as follows:

PART 199—DRUG AND ALCOHOL TESTING—MANAGEMENT INFORMATION SYSTEM REPORTING

1. The authority citation for part 199 is revised to read as follows:

Authority: 49 App. U.S.C. 1672, 1674a, 1681, 1804, 1808, and 2002; 49 CFR 1.53.

2. § 199.23 would be amended by revising paragraph (a)(2) to read as follows:

§ 199.23 Recordkeeping.

(a) * * *

(2) Records of employee drug and alcohol test results that show employees failed a test and records that demonstrate rehabilitation, if any, must be kept for at least 5 years.

* * * * *

3. Section 199.25 would be added to read as follows:

§ 199.25 Annual drug and alcohol testing report.

(a) Each operator shall submit, not later than February 15, a report of its drug and alcohol testing program for the previous calendar year.

(b) Each report must be made to the Information Resources Manager for Pipeline Safety, Research and Special Programs Administration, Department of Transportation, room 8417, 400 Seventh Street, SW., Washington, DC 20590.

(c) *Instructions.* The following instructions for completion of the report form are in addition to those in § 40.41 of this chapter:

(1) In part A of the report form under "company name," each operator shall state the primary nature of its operations as either gas gathering, gas transmission, gas distribution, transportation of hazardous liquid, or transportation of carbon dioxide.

(2) In part B of the report form, each operator shall report only information on the following employee categories: Operation, maintenance, and emergency-response. If an employee can be assigned to more than one category (e.g., a maintenance worker also responds to emergencies), report the information according to the employee's primary duties.

4. Part 199 is amended by adding Appendix B to read as follows:

BILLING CODE 4910-60-M

APPENDIX B - DRUG AND ALCOHOL TESTING MIS DATA COLLECTION FORM

GENERAL INSTRUCTIONS

This reporting form includes three parts. Collectively, these parts address the data elements required in Research and Special Programs Administration (RSPA) and the U.S. Department of Transportation (DOT) drug and alcohol testing regulations. Each part of the form is preceded by instructions which outline and explain the information requested and indicate the probable sources for this information. The three parts of the form are:

Section	Instructions Pages	Reporting Form Pages
I. ORGANIZATIONAL INFORMATION	i-ii	1-2
II. DRUG TESTING INFORMATION	iii-vii	3-9
III. ALCOHOL TESTING INFORMATION	viii-xii	10-14

I. ORGANIZATIONAL INFORMATION

INSTRUCTIONS

This part of the reporting form includes two sections. These sections, the page number for the instructions, and the page location on the reporting form are:

Section	Instructions Page	Reporting Form Page
A. EMPLOYER INFORMATION	i	1
B. COVERED EMPLOYEES	ii	2

Page 1 **EMPLOYER INFORMATION** (Section A) requires the company name for which the report is done, a current address, the name of the person responsible for completing the form, and a current telephone (including the area code). Be sure check which one of the five categories (gas gathering; gas transmission, gas distribution; transportation of hazardous liquids; and transportation of carbon dioxide) characterizes the **primary** nature of your operation. Finally, a signature and date are required certifying the correctness and completeness of the form.

Page 2

COVERED EMPLOYEES (Section B) requires a count for each employee category that must be tested under RSPA/DOT regulations. For RSPA this includes Operations Personnel ("Operations" in the tables), Maintenance Personnel ("Maintenance" in the tables), and Emergency Response Personnel ("Emergency Response" in the tables). The most likely source for this information is the employer's personnel department. These counts should be based on the company records for the reported year. The **TOTAL** is a count of all covered employees for all categories combined, i.e., the sum of the columns.

Additional information must be completed if your company employs personnel who perform duties covered by the drug and alcohol rules of more than one DOT operating administration. **NUMBER OF EMPLOYEES COVERED BY MORE THAN ONE DOT OPERATING ADMINISTRATION**, requires that you identify the number of employees in each employee category under the appropriate additional operating administration(s).

For Office Use Only

RSPA DRUG AND ALCOHOL TESTING MIS DATA COLLECTION FORM

YEAR COVERED BY THIS REPORT: 19___

A. PIPELINE EMPLOYER INFORMATION

Company _____

Address _____

_____

Person responsible for completing form: _____

Phone Number _____

Check the one box that indicates the primary nature of your operation.

- ☐ Gas gathering
- ☐ Gas transmission
- ☐ Gas distribution
- ☐ Transportation of hazardous liquids
- ☐ Transportation of carbon dioxide

I, the undersigned, certify the attached Research and Special Programs Administration Drug Testing Management Information System Data Collection Form, is to the best of my knowledge and belief, a true, correct, and complete form for the period stated.

_____
Signature

_____
Title

_____
Date of Signature

Title 18, U.S.C. Section 1001, makes it a criminal offense subject to a maximum fine of $10,000, or imprisonment for not more than 5 years, or both, to knowingly and willfully make or cause to be made any false or fraudulent statements or representations in any matter within the jurisdiction of any agency of the United States.

B. COVERED EMPLOYEES

COVERED EMPLOYEES						
EMPLOYEE CATEGORY	NUMBER OF COVERED EMPLOYEES	NUMBER OF EMPLOYEES COVERED BY MORE THAN ONE DOT OPERATING ADMINISTRATION				
		FAA	FHWA	FRA	FTA	USCG
Operations						
Maintenance						
Emergency Response						
TOTAL						

II. DRUG TESTING INFORMATION

INSTRUCTIONS

The following instructions are to be used as a guide for completing the drug testing information in Research and Special Programs Administration (RSPA) and the U.S. Department of Transportation (DOT) **Drug and Alcohol Testing Management Information System Data Collection Form**. These instructions outline and explain the information requested and indicate probable sources for this information. A sample testing results table with a narrative explanation is provided on pages iv-vi as an example to facilitate the process of completing the form correctly.

This part of the reporting form includes four sections. These sections address the data elements required in the regulations. These sections, the page number for the instructions, and the page location on the reporting form are:

Section	Instructions Page	Reporting Form Page
A. JOB APPLICANT TESTING INFORMATION	iv	4
B. EMPLOYEE TESTING	vi	5 7
C. OTHER TESTING/PROGRAM INFORMATION	vi	8
D. TRAINING/EDUCATION	vii	9

Sections A and B are used to summarize the drug testing results for covered employees. There are six tables to be completed (one in Section A and five in Section B). The first table (Section A) is where you enter the data on pre-employment testing. The five tables in Section B are for entering drug testing data on periodic, random, post-accident, reasonable cause, and return to duty testing, respectively. Items necessary to complete these tables include:

1) the number of specimens collected in each employee category;
2) the number of specimens tested which were verified negative and verified positive for any drug(s); and
3) individual counts of those specimens which were verified positive for each of the five drugs.

Do not include results of quality control (QC) samples submitted to the testing laboratory in any of the tables.

A sample table with detailed instructions is provided for Section A, **JOB APPLICANT TESTING INFORMATION**. The format and explanations used for the sample table apply to all six of the tables in Sections A and B.

Information on actions taken with those persons testing positive is required at the end of both Sections A and B. Specific instructions for providing this latter information are given after the instructions for completing the tables in Sections A and B.

Page 4

JOB APPLICANT TESTING INFORMATION (Section A) requires information for pre-employment testing. All numbers entered into this table should be separated into the category of employment for which the applicant was applying. A sample table with example numbers is presented on page v.

Three types of information are necessary to complete the left side of this table. The first blank column with the heading "**NUMBER OF SPECIMENS COLLECTED,**" requires a count for all collected specimens by employee category. It should not include refusals to test. The second blank column with the heading "**NUMBER OF SPECIMENS VERIFIED NEGATIVE,**" requires a count for all completed tests by employee category that were verified negative by your Medical Review Officer (MRO).

The third blank column with the heading "**NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS,**" refers to the number of specimens provided by job applicants that were verified positive. "Verified positive" means the results were verified by your MRO.

The right hand portion of this table, with the heading "**NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG,**" requires counts of positive tests for each of the five drugs for which tests were done, i.e., marijuana (THC), cocaine, phencyclidine (PCP), opiates, and amphetamines. The number of specimens positive for each drug should be entered in the appropriate column for that drug type. Again, "verified positive" refers to test results verified by your MRO.

If an applicant tested positive for more than one drug; for example, both marijuana and cocaine, that person's positive results would be included once in each of the appropriate columns (marijuana and cocaine).

Each column in the table should be added and the answer entered in the row marked "**TOTAL**".

A sample table is provided on page v with example numbers.

Page 4

Below the table for pre-employment testing information is a box with the heading "**Number of persons denied a position as a covered employee following a verified positive drug test**". This is simply a count of those persons who were not placed in a covered position because they tested positive for one or more drugs.

SAMPLE APPLICANT TEST RESULTS TABLE

The following example is for Section A, **JOB APPLICANT TESTING INFORMATION**, which summarizes pre-employment testing results. The procedures detailed here also apply to the tables in Section B which require you to summarize testing results for employees. This example will use RSPA's three categories "Operations", "Maintenance", and "Emergency Response" to illustrate the procedures for completing the form.

A

Urine specimens were collected for 157 job applicants for operations positions during the reporting year. This information is entered in the first blank column of the table in the row marked "Operations".

B

The Medical Review Officer (MRO) for your company reported that 153 of those 157 specimens from applicants for operations positions were negative (i.e., no drugs were detected). Enter this information in the second blank column of the table in the row marked "Operations".

C

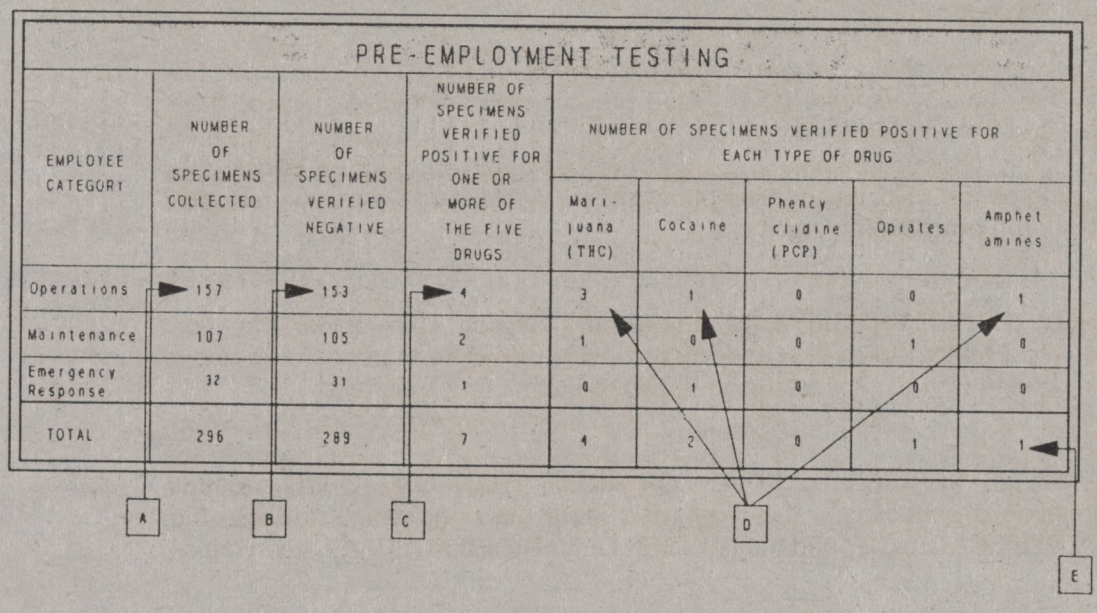
The MRO for your company reported that 4 of those 157 specimens from applicants for operations positions were positive (i.e., a drug or drugs were detected). Enter this information in the third blank column of the table in the row marked "Operations".

D

With the 4 specimens that tested positive, the following drugs were detected:

Specimen	Drugs
#1	Marijuana
#2	Amphetamines
#3	Marijuana and Cocaine (Multi-drug specimen)
#4	Marijuana

Marijuana was detected in three (3) specimens, cocaine in one (1), and amphetamines in one (1). This information is entered in the columns on the right hand side of the table under each of these drugs. Since two different drugs were detected in specimen #3 (multi-drug), entries are made in both the marijuana and the cocaine columns for this specimen. Information on multi-drug specimens must also be entered in Section C, **OTHER TESTING/PROGRAM INFORMATION**, on page 8 of the reporting form.



Please note that the sample data collection form also has information for maintenance workers on line two. The same procedures outlined for operators should be followed for entering the data on maintenance workers. With applicants for maintenance positions, 107 specimens were collected resulting in 105 verified negatives and 2 verified positives -- 1 for marijuana and 1 for opiates. This information is entered in the row marked "Maintenance". Thirty-two specimens were collected for emergency response positions resulting in thirty verified negatives and one verified positive for cocaine.

E

The last row, marked "TOTAL", requires you to add the numbers in each of the columns. With this example, 157 specimens from applicants for operator positions were collected, 107 for applicants for maintenance positions, and 32 for applicants for emergency response positions. The total for that column would be 296 (i.e., 157+107+32). The same procedure should be used for each column, i.e., add all the numbers in that column and place the answer in the last row.

Note that adding up the numbers for each type of drug in a row ("NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG") will not always match the number entered in the third column, "NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS". The total for the numbers on the right hand side of the table may differ from the number of specimens testing positive since some specimens may contain more than one drug.

Remember that the same procedures indicated above are to be used for completing all of the tables in Sections A and B.

Pages 5-7

EMPLOYEE TESTING (Section B), as indicated, requires information for company employees in **covered positions** only. A separate table must be completed for each category of test. These categories include: (1) periodic, (2) random, (3) post-accident, (4) reasonable cause, and (5) return to duty testing. These tables are to be filled out like the sample table above. Again, these numbers **do not** include refusals for testing.

Page 7

Following these tables that summarize **EMPLOYEE TESTING**, you must provide counts for employees who have tested positive and are currently in, or have completed rehabilitation, and have returned to work in a covered position. Report this information only for employees who tested positive during this reporting period. This information should be available from the personnel office and/or drug program manager.

Page 8

OTHER TESTING/PROGRAM INFORMATION (Section C) requires that you complete a table dealing with specimens positive for more than one drug and a table dealing with employees who refused to submit to a drug test.

Page 8

SPECIMENS VERIFIED POSITIVE FOR MORE THAN ONE DRUG requires information on specimens that contained more than one drug. Indicate the **EMPLOYEE CATEGORY** and the **NUMBER OF VERIFIED POSITIVES**, then check

the appropriate columns indicating the combination of drugs reported as positive. For example, if marijuana and cocaine were detected in 3 operations specimens, then you would write "Operations" as the employee category, "3" as the number of verified positives, and "3" in the columns for "Marijuana" and "Cocaine". If marijuana and opiates were detected in 2 operations specimens, then you would write "Operations" as the employee category, "2" as the number of verified positives, and "2" in the columns for "Marijuana" and "Opiates".

Page 8

EMPLOYEES WHO REFUSED TO SUBMIT TO A DRUG TEST requires information on the **NUMBER OF COVERED EMPLOYEES** who refused to submit to a drug test required under this regulation, and a description of the **ACTION TAKEN** in response to the refusal. An example of an action taken would be "removed from covered duties pending termination".

Page 9

TRAINING/EDUCATION (Section D) requires information on the number of covered employees and supervisory personnel who have received the required drug training during the current reporting period.

READ BEFORE COMPLETING THE REMAINDER OF THIS FORM:

1. All items refer to the **current** reporting period **only** (for example, January 1, 1993 - December 31, 1993).

2. This report is only for testing **REQUIRED BY RESEARCH AND SPECIAL PROGRAMS ADMINISTRATION (RSPA) AND THE U.S. DEPARTMENT OF TRANSPORTATION (DOT)**:

   - Results should be reported only for employees in **COVERED POSITIONS** as defined by RSPA/DOT drug testing regulations.

   - The information requested should only include testing for marijuana (THC), cocaine, phencyclidine (PCP), opiates, and amphetamines using the standard procedures required by DOT regulation 49 CFR Part 40.

3. Information on refusals for testing should only be reported in Section C ("OTHER TESTING/PROGRAM INFORMATION"). Do not include refusals for testing in other sections of this report.

4. Do not include the results of any quality control (QC) samples submitted to the testing laboratory in any of the tables.

5. Complete all items; DO NOT LEAVE ANY ITEM BLANK. If the value for an item is zero (0), place a zero (0) on the form.

This part of the form requires information on VERIFIED POSITIVE and VERIFIED NEGATIVE drug tests. These are the results that are reported to you by your Medical Review Officer (MRO).

A. JOB APPLICANT TESTING INFORMATION

PRE-EMPLOYMENT TESTING								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Operations								
Maintenance								
Emergency Response								
TOTAL								

Number of persons denied a position as a covered employee following a verified positive drug test: [ ]

B. EMPLOYEE TESTING

PERIODIC TESTING								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Operations								
Maintenance								
Emergency Response								
TOTAL								

RANDOM TESTING								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Operations								
Maintenance								
Emergency Response								
TOTAL								

B. EMPLOYEE TESTING (continued)

POST-ACCIDENT TESTING								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Operations								
Maintenance								
Emergency Response								
TOTAL								

REASONABLE CAUSE TESTING								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Operations								
Maintenance								
Emergency Response								
TOTAL								

B. EMPLOYEE TESTING (continued)

RETURN TO DUTY TESTING								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Operations								
Maintenance								
Emergency Response								
TOTAL								

Number of employees, currently in or having completed rehabilitation or otherwise qualified to return to duty, who have returned to work in a covered position during this reporting period: [ ]

C. OTHER TESTING/PROGRAM INFORMATION

SPECIMENS VERIFIED POSITIVE FOR MORE THAN ONE DRUG						
EMPLOYEE CATEGORY	NUMBER OF VERIFIED POSITIVES	Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines

EMPLOYEES WHO REFUSED TO SUBMIT TO A DRUG TEST	
NUMBER OF COVERED EMPLOYEES	ACTION TAKEN

D. TRAINING/EDUCATION

Training During Current Reporting Period

Number of covered employees who have received initial training on the consequences, manifestations, and behavioral cues of drug use as required by RSPA drug testing regulations: ☐

Number of supervisory personnel who have received initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable drug use as required by RSPA drug testing regulations: ☐

Number of covered employees who have received recurrent or refresher training on the consequences, manifestations, and behavioral cues of drug use: ☐

Number of supervisory personnel who have received recurrent or refresher training on the specific contemporaneous physical, behavioral, and performance indicators of probable drug use: ☐

III. ALCOHOL TESTING INFORMATION

INSTRUCTIONS

The following instructions are to be used as a guide for completing the alcohol testing information for Research and Special Programs Administration (RSPA) and the U.S. Department of Transportation (DOT) **Drug and Alcohol Testing Management Information System Data Collection Form**. These instructions outline and explain the information requested and indicate probable sources for this information. A sample testing results table with a narrative explanation is provided on pages ix-xi as an example to facilitate the process of completing the form correctly.

This part of the reporting form includes four sections. These sections address the data elements required in the regulations. These sections, the page number for the instructions, and the page location on the reporting form are:

Section	Instructions Page	Reporting Form Page
A. JOB APPLICANT TESTING INFORMATION	ix	10
B. EMPLOYEE TESTING	xi	11-13
C. OTHER TESTING/PROGRAM INFORMATION	xi	13-14
D. TRAINING/EDUCATION	xii	14

Sections A and B are used to summarize the alcohol testing results for covered employees. There are six tables to be completed (one in Section A and five in Section B). The first table (Section A) is where you enter the data on pre-employment/pre-duty testing. The five tables in Section B are for entering alcohol testing data for random, post-accident, reasonable suspicion, return to duty, and follow-up testing, respectively. Items necessary to complete these tables include:

1) the number of initial alcohol tests performed for each employee category;
2) the number of confirmatory alcohol tests performed for each employee category;
3) the number of confirmatory test results which were equal to or greater than 0.04; and
4) the number of confirmatory test results which were equal to or greater than 0.02, but less than 0.04.

A sample table with detailed instructions is provided for Section A, **JOB APPLICANT TESTING INFORMATION**. The format and explanations used for the sample table apply to all six of the tables in Sections A and B.

Information on actions taken with those persons whose alcohol test results were 0.04 or greater is required at the end of both Sections A and B. Specific instructions for providing this latter information are given after the instructions for completing the tables in Sections A and B.

Page 10 **JOB APPLICANT TESTING INFORMATION** (Section A) requires information for pre-employment/pre-duty testing. All numbers entered into this table should be separated into the category of employment for which the applicant was applying. A sample table with example numbers is presented on page x.

Four types of information are necessary to complete the left side of this table. The first blank column with the heading "**NUMBER OF INITIAL TESTS**" requires a count of all initial alcohol tests performed for each employee category. It should not include refusals to test. The second blank column with the heading "**NUMBER OF CONFIRMATORY TESTS**" requires a count of all confirmatory alcohol tests performed for each employee category.

The third blank column with the heading "**NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04**" requires a count for each employee category.

The fourth blank column with the heading "**NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04**" requires a count for each employee category.

Each column in the table should be added and the answer entered in the row marked "**TOTAL**".

A sample table is provided on page x with example numbers.

Page 10 Below the table for pre-employment testing information is a box with the heading "**Number of persons denied a position as a covered employee following a pre-employment/pre-duty alcohol test indicating an alcohol concentration of 0.04 or greater**". Enter the appropriate number in the box provided.

SAMPLE APPLICANT TEST RESULTS TABLE

The following example is for Section A, **JOB APPLICANT TESTING INFORMATION**, which summarizes pre-employment/pre-duty testing results. The procedures detailed here also apply to the tables in Section B which require you to summarize testing results for employees. This example will use RSPA's three categories "Operations", "Maintenance", and "Emergency Response" to illustrate the procedures for completing the form.

A Initial tests were performed on 157 job applicants for operations positions during the reporting year. This information is entered in the first blank column of the table in the row marked "Operations".

B Confirmatory tests were necessary for 6 of the 157 applicants for operations positions. Enter this information in the second blank column of the table in the row marked "Operations". The confirmatory test results for these 6 applicants were the following:

Applicant	Confirmation Result
#1	0.06
#2	0.01
#3	0.11
#4	0.04
#5	0.03
#6	0.02

C The confirmatory test results for 3 of the applicants for operations positions were equal to or greater than 0.04. Enter this information in the third blank column of the table in the row marked "Operations".

D The confirmatory test results for 2 of the applicants for operations positions were equal to or greater than 0.02, but less than 0.04. Enter this information in the fourth blank column of the table in the row marked "Operations".

E The last row, marked "TOTAL", requires you to add the numbers in each of the columns. With this example, 157 applicants for operations positions, 107 applicants for maintenance positions, and 32 applicants for emergency response positions were subjected to initial tests. The total for that column would be 296 (i.e., 157 + 107 + 32). The same procedure should be used for each column (i.e., add all the numbers in that column and place the answer in the last row).

PRE-EMPLOYMENT/PRE-DUTY TESTING

EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Operations	157	6	3	2
Maintenance	107	3	1	0
Emergency Response	32	0	0	0
TOTAL	296	9	4	2

A B C D E

Please note that the sample data collection form also has information for maintenance workers on line two. The same procedures outlined for operations should be followed for entering the data on maintenance workers. With applicants for maintenance positions, 107 initial tests were conducted resulting in 3 confirmatory tests. The confirmatory test result for 1 of the maintenance worker applicants was equal to or greater than 0.04; no results were equal to or greater than 0.02, but less than 0.04. This information is entered in the row marked "Maintenance". Thirty-two

specimens were collected for emergency response positions with no confirmatory tests performed.

Note that adding up the numbers for confirmation results in columns three and four will not always match the number entered in the second column, "NUMBER OF CONFIRMATORY TESTS". These numbers may differ since some confirmatory test results may be less than 0.02.

Remember that the same procedures indicated above are to be used for completing all of the tables in Sections A and B.

Pages 11-13 **EMPLOYEE TESTING** (Section B), as indicated, requires information for company employees in **covered positions** only. A separate table must be completed for each category of test. These categories include: (1) random, (2) post-accident, (3) reasonable suspicion, (4) return to duty, and (5) follow-up testing. These tables are to be filled out like the sample table above. Again, these numbers **do not** include refusals for testing.

Page 12 Following these tables that summarize **EMPLOYEE TESTING**, you must provide a count of the **"Number of employees with a confirmatory alcohol test indicating an alcohol concentration of 0.04 or greater who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in DOT regulations)"**. Report this information only for employees who were tested during this reporting period. This information should be available from the personnel office and/or alcohol program manager.

Pages 13-14 **OTHER TESTING/PROGRAM INFORMATION** (Section C) requires that you provide information on employees who tested positive for drugs and alcohol (at the same time), information on violations of other alcohol provisions (not necessarily resulting in positive alcohol tests), and information on employees who refused to submit to an alcohol test.

Page 13 **Number of employees administered drug and alcohol tests at the same time resulting in a verified positive drug test and an alcohol test indicating an alcohol concentration of 0.04 or greater**, requires that a count of all such employees be entered in the indicated box.

Page 13 **VIOLATIONS OF OTHER ALCOHOL PROVISIONS/PROHIBITIONS OF THIS REGULATION**, requires information on the **NUMBER OF COVERED EMPLOYEES** committing such a violation, a description of the **VIOLATION** committed (e.g., pre-duty alcohol use, on duty alcohol use, on duty alcohol possession), and a description of the **ACTION TAKEN** in response to the violation.

Page 14 **EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST** requires information on the **NUMBER OF COVERED EMPLOYEES** who refused to submit to an alcohol test as required under this regulation, and a description of the **ACTION TAKEN** in response to the refusal.

Page 14 **TRAINING/EDUCATION** (Section D) requires information on the number of supervisory personnel who have received the required alcohol training during the current reporting period.

READ BEFORE COMPLETING THE REMAINDER OF THIS FORM:

1. All items refer to the **current** reporting period **only** (for example, January 1, 1993 - December 31, 1993).

2. This report is only for testing **REQUIRED BY RESEARCH AND SPECIAL PROGRAMS ADMINISTRATION (RSPA) AND THE U.S. DEPARTMENT OF TRANSPORTATION (DOT)**:

   - Results should be reported only for employees in **COVERED POSITIONS** as defined by RSPA/DOT alcohol testing regulations.
   - The information requested should only include testing for alcohol using the standard procedures required by DOT regulation 49 CFR Part 40.

3. Information on refusals for testing should only be reported in Section C ("OTHER TESTING/PROGRAM INFORMATION"). Do not include refusals for testing in other sections of this part of the report.

4. Complete all items; DO NOT LEAVE ANY ITEM BLANK. If the value for an item is zero (0), place a zero (0) on the form.

A. JOB APPLICANT TESTING INFORMATION

PRE-EMPLOYMENT/PRE-DUTY TESTING				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Operations				
Maintenance				
Emergency Response				
TOTAL				

Number of persons denied a position as a covered employee following a pre-employment/pre-duty alcohol test indicating an alcohol concentration of 0.04 or greater: [ ]

B. EMPLOYEE TESTING

RANDOM TESTING				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Operations				
Maintenance				
Emergency Response				
TOTAL				

POST-ACCIDENT TESTING				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Operations				
Maintenance				
Emergency Response				
TOTAL				

B. EMPLOYEE TESTING (continued)

REASONABLE SUSPICION TESTING				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Operations				
Maintenance				
Emergency Response				
TOTAL				

RETURN TO DUTY TESTING				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Operations				
Maintenance				
Emergency Response				
TOTAL				

Number of employees with a confirmatory alcohol test indicating an alcohol concentration of 0.04 or greater who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in RSPA regulations): [ ]

B. EMPLOYEE TESTING (continued)

FOLLOW-UP TESTING				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Operations				
Maintenance				
Emergency Response				
TOTAL				

C. OTHER TESTING/ PROGRAM INFORMATION

Number of employees administered drug and alcohol tests at the same time resulting in a verified positive drug test and an alcohol test indicating an alcohol concentration of 0.04 or greater: ____

VIOLATIONS OF OTHER ALCOHOL PROVISIONS/PROHIBITIONS OF THIS REGULATION		
NUMBER OF COVERED EMPLOYEES	VIOLATION	ACTION TAKEN

C. OTHER TESTING/PROGRAM INFORMATION (continued)

EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST	
NUMBER OF COVERED EMPLOYEES	ACTION TAKEN

D. TRAINING/EDUCATION

Training During Current Reporting Period

Number of supervisors who have received the required training in determining the existence of reasonable suspicion of alcohol misuse: ☐

BILLING CODE 4910-60-C

Issued in Washington, DC, on December 2, 1992.

Andrew H. Card, Jr.,

Secretary of Transportation.

Douglas B. Ham,

Acting Administrator, Research and Special Programs Administration.

[FR Doc. 92–29688 Filed 12–10–92; 10:00 am]

BILLING CODE 4910–60–M

federal register

Tuesday
December 15, 1992

Part VIII

Department of Transportation

Coast Guard

46 CFR Part 16
Drug and Alcohol Testing Programs; Proposed Rules

DEPARTMENT OF TRANSPORTATION

Coast Guard

46 CFR Part 16

[CGD 91–019]

RIN 2115–AD84

Chemical Drug and Alcohol Testing of Commercial Vessel Personnel; Collection of Drug and Alcohol Testing Information

AGENCY: Coast Guard, DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to amend its regulations for chemical drug and alcohol testing of commercial vessel personnel to include information collection requirements regarding marine industry drug and alcohol testing programs. The Coast Guard proposes to collect this data in order to assess the effectiveness of the marine industry drug and alcohol testing programs.

DATES: Comments must be received on or before April 14, 1993.

ADDRESSES: Comments may be mailed to the Executive Secretary, Marine Safety Council (G–LRA/3406) (CGD 91–019), U.S. Coast Guard Headquarters, 2100 Second Street, SW., Washington, DC 20593–0001, or may be delivered to room 3406 at the above address between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 267–1477. Comments on collection of information requirements must be mailed also to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attn: Desk Officer, U.S. Coast Guard.

The Executive Secretary maintains the public docket for this rulemaking. Comments will become part of this docket and will be available for inspection or copying at room 3406, U.S. Coast Guard Headquarters.

FOR FURTHER INFORMATION CONTACT: LCDR M. A. Grossetti, Marine Investigation Division, Office of Marine Safety, Security and Environmental Protection, (202) 267–1421.

SUPPLEMENTARY INFORMATION:

Request for Comments

The Coast Guard encourages interested persons to participate in this rulemaking by submitting written arguments, views or data. Persons submitting comments should include their names and addresses, identify this rulemaking (CGD 91–019) and the specific section of this proposal to which each comment applies, and give a reason for each comment. The Coast Guard requests that all comments and attachments be submitted in an unbound format suitable for copying and electronic filing. If not practical, a second copy of any bound materials is requested. Persons wanting acknowledgment of receipt of comments should enclose a stamped, self-addressed post card or envelope.

The Coast Guard will consider all comments received during the comment period. Persons may request a public hearing by writing to the Marine Safety Council at the address under "ADDRESSES." The request should include reasons why a hearing would be beneficial. If the Coast Guard determines that the opportunity for oral presentations will aid this rulemaking, a public hearing will be held at a time and place announced by a later notice in the Federal Register.

Elsewhere in today's Federal Register is the parallel proposal for the management information system (MIS) in the NPRM regarding 49 CFR part 40. The preamble to that NPRM contains many comments, discussions and questions that should be considered in reviewing this Operating Administration NPRM. Your comments on this NPRM should indicate that you are responding to questions or comments found in the generic NPRM under 49 CFR part 40 or the specific NPRM under this Operating Administration rule.

Drafting Information

The principal persons involved in drafting this document are LCDR M. A. Grossetti, Project Manager, Office of Marine Safety, Security and Environmental Protection, and Helen G. Boutrous, Project Counsel, Office of Chief Counsel.

Background and Purpose

On December 14, 1987, the Coast Guard published regulations regarding operating a vessel while intoxicated. (52 FR 47526) Those regulations established standards of intoxication and authorized law enforcement officers and marine employers to direct individuals operating a vessel to undergo a chemical test for reasonable cause. On November 21, 1988, the Coast Guard issued a final rule (the "1988 Final Rule") requiring marine employers to establish chemical drug programs for their covered employees and job applicants that included pre-employment, periodic, random, post-accident and reasonable cause tests. Additionally, the rules require post-accident testing for alcohol. (53 FR 47063) On the same date, the Department of Transportation published an interim final rule establishing drug testing procedures. (53 FR 47002) The interim final rule followed closely the Department of Health and Human Services (DHHS) regulation entitled "Mandatory Guidelines for Federal Workplace Drug Testing Programs." (53 FR 11970) On December 1, 1989, DOT published a final rule (54 FR 49854) which responded to all comments to the interim rule and incorporated appropriate changes. (49 CFR part 40)

In October 1989, approximately one year after the Coast Guard published its 1988 final rule, the Secretary of Transportation appointed a Special Assistant for Drug Enforcement and Program Compliance. The Special Assistant is responsible for determining the effectiveness of the transportation industry drug and alcohol testing programs. A November 1989 General Accounting Office report entitled, "Drug Testing: Management Problems and Legal Challenges Facing DOT's Industry Programs", provided additional suggestions for monitoring the effectiveness of the drug testing programs.

DOT has determined that the most appropriate method to monitor the effectiveness of the transportation industry drug testing programs is to create a Management Information System (MIS). Representatives from each DOT operating administration (OA) participated in a working group to formulate a MIS proposal for the drug and alcohol testing programs. Numerous alternatives and information collection processes were considered. It was noted that whereas DHHS certified laboratories could provide only laboratory analysis data, medical review officers (MROs) could provide only drug test verification information, and collection facilities could provide only specimen collection data, employers receive drug testing information from labs, MROs and collection facilities, and therefore, could provide all the necessary data for an effective MIS. Thus, the regulated employers are the appropriate source of comprehensive drug testing data.

To implement and sustain an effective, multi-modal MIS, the Coast Guard proposes to develop data collection rules appropriate for the maritime industry. The maritime industry data may then be combined with the data from other transportation industries to provide an overall view of the effectiveness of the transportation industry drug testing programs.

Discussion of Proposed Amendments

Elsewhere in this Federal Register, DOT is proposing to amend 49 CFR part 40. The DOT proposal states that the 1988 drug testing rules were not intended to be static and remain unchanged. Because over-regulation is as unwanted as under-regulation, DOT seeks information about drug use prevalence, program implementation, and economic and logistical impacts of rules to provide a basis for policy review, development and change. The DOT proposal indicates that program evaluation requires transportation industry input because issues such as scope of applicability, random test rates, cost-benefit ratios, rehabilitation and testing protocols can be addressed effectively only with careful consideration of the information held by transportation industry employers. The DOT proposal describes the data elements that DOT expects each operating administration to require employers in their respective regulated industries to collect and submit.

The Coast Guard proposes to amend 46 CFR part 16 to comport with the 49 CFR part 40 data collection proposal by proposing a new § 16.500 containing a proposed list of the data that each marine employer or employer's representative (including a consortium) must collect and submit to the Coast Guard, and a proposal that marine employers that have operations regulated by other OAs submit appropriate data to each regulating OA for those employees covered by that OA rule.

The DOT proposal would require all transportation industry employers to collect data on a calendar year basis, from January 1 to December 31, and to submit at least one report per calendar year, but allows OAs to propose the data submittal frequency for their regulated industry employers.

The DOT proposal would require OAs to collect drug testing program data but would give OAs the authority to amend their drug and alcohol testing regulations as appropriate for their respective industries. Accordingly, with a view toward limiting the data collection to elements appropriate for the maritime industry, the Coast Guard proposes to require all marine employers to collect and submit annually the following drug and alcohol testing program data:

(1) Number of covered billets, either on a vessel unit basis or employee number basis by employee category. Marine employee categories will be limited to "licensed", "unlicensed (documented)", and "other" personnel, when this information is available.

DOT requires this data both to assess the scope of the drug testing rules' application in the maritime industry and to provide a basis for determining whether maritime industry random testing meets the required 50 percent level.

(2) Number of covered employees subject to testing under the anti-drug rules of more than one DOT Agency, identified by each agency. This data is necessary to review multi-modal implementation so that policy can be designed accordingly.

(3) Number of drug and alcohol tests by test type and covered billet. The drug test types are pre-employment, random, post-accident and reasonable cause. The alcohol test types are post-accident and reasonable cause. Covered billets are those described in (1) above. The Coast Guard intends to compile data submitted individually for periodic tests and not require a cumulative report from employers.

This data will be used both to evaluate the scope of maritime industry drug and alcohol testing program implementation and to determine the prevalence of maritime industry drug and alcohol use.

(4) Number of positive drug test results verified by a Medical Review Officer (MRO) by test type, type of drug(s) and covered billet. Number of alcohol tests resulting in a blood alcohol concentration of .04 percent by weight or more by test type and covered billet.

DOT requires this data to calculate positive drug test result rates and alcohol test result rates exceeding the standard of intoxication in the maritime industry. These rates are necessary to determine the extent of maritime industry drug and alcohol use and the specific drugs used in the various categories of covered billets. Further, analysis of this data over time would provide a measure of the effectiveness of maritime industry drug and alcohol testing rules in deterring drug and alcohol use.

(5) Number of negatives verified by a MRO by type of test, by type of drug, and employee category. This data is needed to check compliance with the rules by category and to review the application of the components of the programs.

(6) Number of applicants denied employment based on positive drug test results verified by an MRO.

DOT requires this data to determine whether the testing program is being implemented as required; to provide a measure of the impact of the drug testing rules on the industries; and to yield information on the prevalence of drug use in the applicant pool.

(7) Number of marine employees with positive drug test results verified by an MRO who were returned to duty in covered positions, having met the requirements of 46 CFR 16.370(d) and 46 CFR part 5.

DOT requires this data to assess the maritime industry's policy regarding rehabilitation of identified drug users.

(8) Number of marine employee drug test results that MROs verify positive for more than one drug.

DOT requires this data to provide information regarding maritime industry multiple drug use.

(9) Number of covered employees who refused to submit to a drug test required under this part, and the action taken in response to the refusal(s). This data provides information on employer policy implementation regarding refusals and subsequent employer actions.

(10) Number of marine employees receiving training and education information.

DOT requires this information to assess the maritime industry's training policies. The DOT proposal also indicates that it would provide a cumulative count of maritime industry covered billets and supervisory personnel on payroll during the covered year who have received the required drug abuse training.

The Coast Guard proposes to have marine employers submit these data elements on the proposed standard forms attached as an appendix to this NPRM. Marine employers would be permitted to photocopy the standard form. Data may be submitted by consortia or other employer representatives on behalf of a marine employer. Each marine employer must notify the Coast Guard in writing of the consortium or representative that will submit the employer's data, and remains responsible for ensuring that the data is submitted.

Regulatory Evaluation

This proposal is considered to be non-major under Executive Order 12291. However, this proposal is considered to be significant under the "Department of Transportation Regulatory Policies and Procedures" (44 FR 11304; February 26, 1979) because of the substantial public interest in, and concern for, a drug and alcohol abuse-free transportation environment. The Coast Guard expects the economic impact of this proposal to be so minimal that a full Regulatory Evaluation is unnecessary.

This action proposes to create standard reporting requirements for

marine employers to submit data on their drug and alcohol testing programs. The Coast Guard proposes to collect this data in order to assess the effectiveness of the maritime industry drug and alcohol testing programs.

The proposed DOT amendment anticipates that the reporting requirements, if adopted, will cause minimal changes in maritime industry compliance burdens and costs. The Coast Guard proposal requests data that marine employers already may be collecting. Instructional materials and guidance being developed by DOT also would reduce the burden of compliance with the proposed regulations.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Coast Guard must consider whether this proposal, if adopted, will have a significant economic impact on a substantial number of small entities. "Small entities" include independently owned and operated small businesses that are not dominant in their field and that otherwise qualify as "small business concerns" under section 3 of the Small Business Act (15 U.S.C. 632). The Coast Guard proposal requests data that marine employers already may be collecting. Instructional materials and guidance being developed by DOT also would reduce the burden of compliance with the proposed regulations. Therefore, the Coast Guard certifies under 5 U.S.C. 605(b) that this proposal, if adopted, will not have a significant economic impact on a substantial number of small entities. If, however, you think that your business qualifies as a small entity and that this proposal will have a significant economic impact on your business, please submit a comment (see "ADDRESSES") explaining why you think your business qualifies and in what way and to what degree this proposal will economically affect your business.

Collection of Information

Under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) reviews each proposed rule which contains an information collection requirement to determine whether the practical value of the information is worth the burden imposed by its collection. Collection of information requirements include reporting, recordkeeping, notification, and other, similar requirements.

This proposal contains collection of information requirements in § 16.500. The following particulars apply:

DOT No.: 2115.

OMB Control No.: 2115–XXXX.

Administration: U.S. Coast Guard.

Title: Chemical Drug and Alcohol Testing of Commercial Vessel Personnel; Collection of Drug and Alcohol Testing Information.

Need for Information: To enable DOT to monitor the effectiveness of the transportation industry drug and alcohol testing programs.

Proposed Use of Information: Marine industry data will be combined with the data from other transportation industries to provide an overall view of the effectiveness of the transportation industry drug and alcohol testing programs.

Frequency of Response: Annual.

Burden Estimate: 7262.

Respondents: 14,000.

Forms: United States Coast Guard Drug Testing Management Information System Data Collection Form.

Average Burden Hours Per Respondent: .2687.

The Coast Guard has submitted the requirements to OMB for review under section 3504(h) of the Paperwork Reduction Act. Persons submitting comments on the requirements should submit their comments both to OMB and to the Coast Guard where indicated under "ADDRESSES."

Federalism

The Coast Guard has analyzed this proposal in accordance with the principles and criteria contained in Executive Order 12612 and has determined that this proposal does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. The authority to require programs for chemical drug and alcohol testing of commercial vessel personnel has been committed to the Coast Guard by Federal statutes. This proposed rule would, therefore, if adopted, preempt State and local regulations on the same subject matter.

Environment

The Coast Guard considered the environmental impact of this proposal and concluded that under section 2.B.2 of Commandant Instruction M16475.1B, this proposal is categorically excluded from further environmental documentation. This proposal merely requires the reporting of drug and alcohol testing information and clearly would have no impact on the environment. A Categorical Exclusion Determination is available in the docket for inspection or copying where indicated under "ADDRESSES."

List of Subjects in 46 CFR Part 16

Drug testing, Marine safety, Reporting and recordkeeping requirements, Safety, Transportation.

For the reasons set out in the preamble, the Coast Guard proposes to amend 46 CFR part 16 as follows:

PART 16—CHEMICAL TESTING

1. The authority citation for part 16 continues to read as follows:

Authority: 46 U.S.C. 2103, 3306, 7101, 7301 and 7701; 49 CFR 1.46.

2. Section 16.500 is added to read as follows:

§ 16.500 Management Information System requirements.

(a) All marine employers shall collect the drug and alcohol testing program data identified in this section for each calendar year, January 1 to December 31. Marine employers shall submit this data to the Coast Guard by February 15 of the following year at Commandant (G–MMI), 2100 Second Street, SW., Washington, DC, 20593–0001.

(b) All marine employers shall collect the following drug and alcohol testing program data:

(1) Number of covered billets either on a vessel unit basis or on an employee number basis by employee category. The employee categories are licensed, unlicensed (documented), and other, when this information is available.

(2) Number of covered employees subject to testing under the anti-drug rules of more than one DOT agency, identified by each agency.

(3) Number of drug and alcohol tests by test type and covered billet. The drug test types are pre-employment, random, post-accident and reasonable cause. The alcohol test types are post-accident and reasonable cause. The covered billets are set forth in paragraph (b)(1) of this section.

(4) Number of positive drug test results verified by a Medical Review Officer (MRO) by test type, type of drug(s) and covered billet. Number of alcohol tests resulting in a blood alcohol concentration of .04 percent by weight or more by test type and covered billet.

(5) Number of negatives verified by an MRO by type of test, type of drug, and employee category.

(6) Number of applicants denied employment based on a positive drug test result verified by an MRO.

(7) Number of marine employees with a positive drug test result verified by an MRO, who were returned to duty in a covered position, having met the requirements of § 16.370(d) and part 5 of this chapter.

(8) Number of marine employee drug test results that MROs verify positive for more than one drug or combination of drugs.

(9) Number of covered employees who refused to submit to a drug test

required under this part, and the action taken in response to the refusal(s).

(10) Marine employee training and education information.

(c) The data listed in paragraph (b) of this section shall be submitted to the Coast Guard on the standard forms provided in the appendix to this part. All items on the form must be completed. Data may be submitted by consortia or other employer representatives on behalf of a marine employer. Each marine employer must notify the Coast Guard in writing of the consortium or representative that will submit the employer's data, and remains responsible for ensuring that the data is submitted.

(d) Marine employers that conduct operations regulated by another Department of Transportation Operating Administration must submit appropriate data to that Operating Administration for those employees covered by that Operating Administration's regulations.

3. Part 16 is amended by adding appendix B to read as follows:

BILLING CODE 4910-14-M

APPENDIX B - DRUG AND ALCOHOL TESTING MIS DATA COLLECTION FORM

GENERAL INSTRUCTIONS

This reporting form includes three parts. Collectively, these parts address the data elements required in the United States Coast Guard (USCG) and the U.S. Department of Transportation (DOT) drug and alcohol testing regulations. Each part of the form is preceded by instructions which outline and explain the information requested and indicate the probable sources for this information. The three parts of the form are:

Section	Instructions Pages	Reporting Form Pages
I. ORGANIZATIONAL INFORMATION	i-ii	1-2
II. DRUG TESTING INFORMATION	iii-vii	3-7
III. ALCOHOL TESTING INFORMATION	viii-x	8-9

I. ORGANIZATIONAL INFORMATION

INSTRUCTIONS

This part of the reporting form includes two sections. These sections, the page number for the instructions, and the page location on the reporting form are:

Section	Instructions Page	Reporting Form Page
A. EMPLOYER INFORMATION	i	1
B. COVERED BILLETS	ii	2

Page 1 **EMPLOYER INFORMATION** (Section A) requires the company name for which the report is done and a current address. Below this, a signature, date and current telephone (including the area code) are required certifying the correctness and completeness of the form.

Page 2

COVERED BILLETS (Section B) requires a count for each employee category that must be tested under USCG/DOT regulations. The employee categories are "Licensed", "Unlicensed (Documented)" and "Other". The most likely source for this information is the employer's personnel department. These counts should be based on the company records for the reported year. The **TOTAL** is a count of **all** covered employees for **all** categories combined, i.e., the sum of the columns.

Additional information must be completed if your company employs personnel who perform duties covered by the drug and alcohol rules of more than one DOT operating administration. **NUMBER OF EMPLOYEES COVERED BY MORE THAN ONE DOT OPERATING ADMINISTRATION**, requires that you identify the number of employees in each employee category under the appropriate additional operating administration(s).

For Office Use Only

USCG DRUG AND ALCOHOL MIS DATA COLLECTION FORM

YEAR COVERED BY THIS REPORT: 19__

A MARITIME EMPLOYER INFORMATION

Company _____

Address _____

_____

_____

I, the undersigned, certify the attached United States Department of Transportation Drug and Alcohol Testing Management Information System Data Collection Form is, to the best of my knowledge and belief, a true, correct, and complete form for the period stated

_____
Signature

_____
Title

_____
Date of Signature

_____
Phone Number

Title 18, U.S.C. Section 1001, makes it a criminal offense subject to a maximum fine of $10,000, or imprisonment for not more than 5 years, or both, to knowingly and willfully make or cause to be made any false or fraudulent statements or representations in any matter within the jurisdiction of any agency of the United States.

B. COVERED BILLETS

COVERED BILLETS						
EMPLOYEE CATEGORY	NUMBER OF COVERED BILLETS	NUMBER OF EMPLOYEES COVERED BY MORE THAN ONE DOT OPERATING ADMINISTRATION				
		FAA	FHWA	FRA	FTA	RSPA
Licensed						
Unlicensed (Documented)						
Other Personnel						
TOTAL						

II. DRUG TESTING INFORMATION

INSTRUCTIONS

The following instructions are to be used as a guide for completing the drug testing information in the United States Coast Guard (USCG) and the U.S. Department of Transportation (DOT) **Drug and Alcohol Testing Management Information System Data Collection Form.** These instructions outline and explain the information requested and indicate probable sources for this information. A sample testing results table with a narrative explanation is provided on pages iv-vi as an example to facilitate the process of completing the form correctly.

This part of the reporting form includes three sections. These sections address the data elements required in the regulations. These sections, the page number for the instructions, and the page location on the reporting form are:

Section	Instructions Page	Reporting Form Page
A. MARINE EMPLOYEE TESTING	iii	4-5
B. OTHER TESTING/PROGRAM INFORMATION	vi	6
C. TRAINING/EDUCATION	vii	7

Sections A is used to summarize the drug testing results for covered marine employees. There are four tables to be completed. In the appropriate table, enter the data on pre-employment testing, random, post-accident, and reasonable cause. Items necessary to complete these tables include:

1) the number of specimens collected in each employee category;
2) the number of specimens tested which were verified negative and verified positive for any drug(s); and
3) individual counts of those specimens which were verified positive for each of the five drugs.

Do not include results of quality control (QC) samples submitted to the testing laboratory in any of the tables.

A sample pre-employment table with detailed instructions is provided for Section A, **MARINE EMPLOYEE TESTING INFORMATION**. The format and explanations used for the sample table apply to all of the tables in Section A.

Information on actions taken with those persons testing positive is required at the end of Section A. Specific instructions for providing this latter information are given after the instructions for completing the tables in Section A.

Page 4 **MARINE EMPLOYEE TESTING INFORMATION** (Section A) requires information for pre-employment, random, post-accident, and reasonable cause testing. All numbers entered into this table should be separated into the category of

employment for which the applicant was applying. A sample table with example numbers is presented on page v.

Three types of information are necessary to complete the left side of this table. The first blank column with the heading "**NUMBER OF SPECIMENS COLLECTED,**" requires a count for all collected specimens by employee category. It should not include refusals to test. The second blank column with the heading "**NUMBER OF SPECIMENS VERIFIED NEGATIVE,**" requires a count for all completed tests by employee category that were verified negative by your Medical Review Officer (MRO).

The third blank column with the heading "**NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS,**" refers to the number of specimens provided by job applicants that were verified positive. "Verified positive" means the results were verified by your MRO.

The right hand portion of this table, with the heading "**NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG,**" requires counts of positive tests **for each** of the five drugs for which tests were done, i.e., marijuana (THC), cocaine, phencyclidine (PCP), opiates, and amphetamines. The number of specimens positive for each drug should be entered in the appropriate column for that drug type. Again, "verified positive" refers to test results verified by your MRO.

If an applicant tested positive for more than one drug; for example, both marijuana and cocaine, that person's positive results would be included once in each of the appropriate columns (marijuana and cocaine).

Each column in the table should be added and the answer entered in the row marked "**TOTAL**".

A sample table is provided on page v with example numbers.

Page 4

Below the table for pre-employment testing information is a box with the heading "**Number of persons denied a position as a covered employee following a verified positive drug test**". This is simply a count of those persons who were not placed in a covered position because they tested positive for one or more drugs.

SAMPLE MARINE EMPLOYEE TEST RESULTS TABLE

The following example is for Section A, pre-employment testing, which summarizes pre-employment testing results. The procedures detailed here also apply to the tables on random, post-accident, and reasonable cause testing. Marine industry categories are "Licensed", "Unlicensed (Documented), and "Other".

A

Urine specimens were collected for 157 job applicants for licensed positions during the reporting year. This information is entered in the first blank column of the table in the row marked "Licensed".

B

The Medical Review Officer (MRO) for your company reported that 153 of those 157 specimens from applicants for licensed positions were negative (i.e., no drugs were detected). Enter this information in the second blank column of the table in the row marked "Licensed".

C

The MRO for your company reported that 4 of those 157 specimens from applicants for licensed positions were positive (i.e., a drug or drugs were detected). Enter this information in the third blank column of the table in the row marked "Licensed".

D

With the 4 specimens that tested positive, the following drugs were detected:

Specimen	Drugs
#1	Marijuana
#2	Amphetamines
#3	Marijuana and Cocaine (Multi-drug specimen)
#4	Marijuana

Marijuana was detected in three (3) specimens, cocaine in one (1), and amphetamines in one (1). This information is entered in the columns on the right hand side of the table under each of these drugs. Since two different drugs were detected in specimen #3 (multi-drug), entries are made in both the marijuana and the cocaine columns for this specimen. Information on multi-drug specimens must also be entered in Section B, OTHER TESTING/PROGRAM INFORMATION, on page 6 of the reporting form.

Please note that the sample data collection form also has information for unlicensed (documented) workers on line two. The same procedures outlined for licensed positions should be followed for entering the data on unlicensed (documented) positions. With applicants for unlicensed (documented) positions, 107 specimens were collected resulting in 105 verified negatives and 2 verified positives -- 1 for marijuana and 1 for opiates. This information is entered in the row marked "Unlicensed (Documented)". No testing was done with the "Other" employee category so zeros (0's) were entered in those spaces.

PRE-EMPLOYMENT TESTING

EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Licensed	157	153	4	3	1	0	0	1
Unlicensed (Documented)	107	105	2	1	0	0	1	0
Other	0	0	0	0	0	0	0	0
TOTAL	264	258	6	4	1	0	1	1

A B C D E

E

The last row, marked "TOTAL", requires you to add the numbers in each of the columns. With this example, 157 specimens from applicants for licensed positions were collected and 107 for applicants for unlicensed (documented) positions. The total for that column would be 264 (i.e., 157+107). The same procedure should be used for each column, i.e., add all the numbers in that column and place the answer in the last row.

Note that adding up the numbers for each type of drug in a row ("NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG") will not always match the number entered in the third column, "NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS". The total for the numbers on the right hand side of the table may differ from the number of specimens testing positive since some specimens may contain more than one drug.

Remember that the same procedures indicated above are to be used for completing all of the tables in Sections A.

Page 5

Following these tables that summarize **MARINE EMPLOYEE TESTING**, you must provide counts for employees who have tested positive and were returned to duty in a covered position, after meeting the requirements of 46 CFR Part 16.370 (d) and 46 CFR Part 5. Report this information only for employees who tested positive during this reporting period. This information should be available from the personnel office and/or drug program manager.

Page 6

OTHER TESTING/PROGRAM INFORMATION (Section B) requires that you complete a table dealing with specimens positive for more than one drug and a table dealing with employees who refused to submit to a drug test.

Page 6

SPECIMENS VERIFIED POSITIVE FOR MORE THAN ONE DRUG requires information on specimens that contained more than one drug. Indicate the **EMPLOYEE CATEGORY** and the **NUMBER OF VERIFIED POSITIVES**, then check the appropriate columns indicating the combination of drugs reported as positive. For example, if marijuana and cocaine were detected in 3 licensed specimens, then you would write "Licensed" as the employee category, "3" as the number of verified positives, and "3" in the columns for "Marijuana" and "Cocaine". If marijuana and opiates were detected in 2 licensed specimens, then you would write "Licensed" as the employee category, "2" as the number of verified positives, and "2" in the columns for "Marijuana" and "Opiates".

Page 6

EMPLOYEES WHO REFUSED TO SUBMIT TO A DRUG TEST requires information on the **NUMBER OF COVERED EMPLOYEES** who refused to submit to a drug test required under this regulation, and a description of the **ACTION TAKEN** in response to the refusal. An example of an action taken would be "removed from covered duties pending termination".

Page 7 **TRAINING/EDUCATION** (Section C) requires information on the number of covered employees and supervisory personnel who have received the required drug training during the current reporting period.

READ BEFORE COMPLETING THE REMAINDER OF THIS FORM:

1. All items refer to the **current** reporting period **only** (for example, January 1, 1993 - December 31, 1993).

2. This report is only for testing **REQUIRED BY THE UNITED STATES COAST GUARD (USCG)**:

   - Results should be reported only for employees in **COVERED POSITIONS** as defined by USCG drug testing regulations.

   - The information requested should only include testing for marijuana (THC), cocaine, phencyclidine (PCP), opiates, and amphetamines using the standard procedures required by DOT regulation 49 CFR Part 40.

3. Information on refusals for testing should only be reported in Section B ("OTHER TESTING/PROGRAM INFORMATION"). Do not include refusals for testing in other sections of this report.

4. Do not include the results of any quality control (QC) samples submitted to the testing laboratory in any of the tables.

5. Complete all items; DO NOT LEAVE ANY ITEM BLANK. If the value for an item is zero (0), place a zero (0) on the form.

This part of the form requires information on VERIFIED POSITIVE and VERIFIED NEGATIVE drug tests. These are the results that are reported to you by your Medical Review Officer (MRO).

A. MARINE EMPLOYEE TESTING INFORMATION

PRE-EMPLOYMENT TESTING								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Licensed								
Unlicensed (Documented)								
Other								
TOTAL								

Number of persons denied a position as a covered employee following a verified positive drug test: [ ]

RANDOM TESTING								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Licensed								
Unlicensed (Documented)								
Other								
TOTAL								

A. MARINE EMPLOYEE TESTING INFORMATION (continued)

POST-ACCIDENT TESTING								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Licensed								
Unlicensed (Documented)								
Other								
TOTAL								

REASONABLE CAUSE TESTING								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Licensed								
Unlicensed (Documented)								
Other								
TOTAL								

Number of marine employees with a positive drug test result verified by an MRO, who were returned to duty in a covered position, having met the requirements of 46 CFR 16.370 (d) and 46 CFR Part 5: [ ]

B. OTHER TESTING/PROGRAM INFORMATION

SPECIMENS VERIFIED POSITIVE FOR MORE THAN ONE DRUG						
EMPLOYEE CATEGORY	NUMBER OF VERIFIED POSITIVES	Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines

EMPLOYEES WHO REFUSED TO SUBMIT TO A DRUG TEST	
NUMBER OF COVERED EMPLOYEES	ACTION TAKEN

C. TRAINING/EDUCATION

Training During Current Reporting Period

Number of covered employees who have received initial training on the consequences, manifestations, and behavioral cues of drug use as required by USCG drug testing regulations: ☐

Number of supervisory personnel who have received initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable drug use as required by USCG drug testing regulations: ☐

Number of covered employees who have received recurrent or refresher training on the consequences, manifestations, and behavioral cues of drug use: ☐

Number of supervisory personnel who have received recurrent or refresher training on the specific contemporaneous physical, behavioral, and performance indicators of probable drug use: ☐

III. ALCOHOL TESTING INFORMATION

INSTRUCTIONS

The following instructions are to be used as a guide for completing the alcohol testing information for the United States Coast Guard (USCG) and the U.S. Department of Transportation (DOT) **Drug and Alcohol Testing Management Information System Data Collection Form**. These instructions outline and explain the information requested and indicate probable sources for this information. A sample testing results table with a narrative explanation is provided on pages ix-x as an example to facilitate the process of completing the form correctly.

This part of the reporting form includes three sections. These sections address the data elements required in the regulations. These sections, the page number for the instructions, and the page location on the reporting form are:

Section	Instructions Page	Reporting Form Page
A. MARINE EMPLOYEE TESTING INFORMATION	viii	8
B. TRAINING/EDUCATION	x	9

Section A is used to summarize the alcohol testing results for covered employees. There are two tables to be completed. The first table is where you enter the data on post-accident testing and the reasonable cause testing data is entered in the second table. Items necessary to complete these tables include:

1) the number of alcohol tests conducted for each employee category; and
2) the number of test results which were equal to or greater than 0.04.

A sample post-accident table with detailed instructions is provided for Section A MARINE **EMPLOYEE TESTING INFORMATION**. The format and explanations used for the sample table also apply to the reasonable cause table in Section A.

Page 8

MARINE EMPLOYEE TESTING INFORMATION (Section A) requires information for post-accident and reasonable cause testing. All numbers entered into this table should be separated into the appropriate category of employment. A sample table with example numbers is presented on page ix.

Two types of information are necessary to complete this table. The first blank column with the heading "**NUMBER OF TESTS**" requires a count of all alcohol tests conducted for each employee category. It should not include refusals to test.

The second blank column with the heading "**NUMBER OF TEST RESULTS EQUAL TO OR GREATER THAN 0.04**" requires a count for each employee category.

Each column in the table should be added and the answer entered in the row marked "**TOTAL**".

A sample table is provided on page ix with example numbers.

SAMPLE MARINE EMPLOYEE TEST RESULTS TABLE

The following example is for Section A, post-accident testing results. The procedures detailed here also apply to the table on reasonable cause testing. Marine industry categories are "Licensed", "Unlicensed (Documented)", and "Other".

A

Tests were conducted on 6 employees in licensed positions during the reporting year. This information is entered in the first blank column of the table in the row marked "Licensed". The test results for these 6 employees were the following:

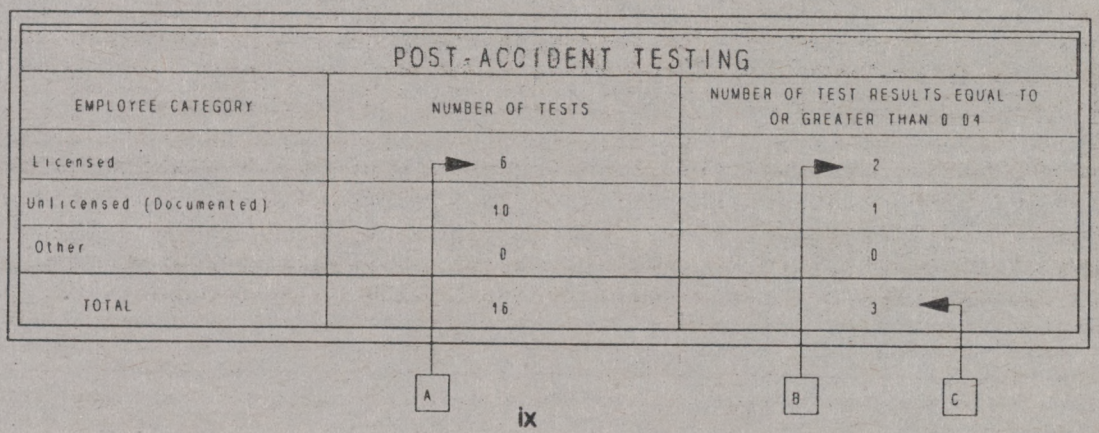
Employee	Result
#1	0.06
#2	0.01
#3	0.01
#4	0.04
#5	0.03
#6	0.02

B

The test results for 2 of the employees in licensed positions were equal to or greater than 0.04. Enter this information in the second blank column of the table in the row marked "Licensed".

C

The last row, marked "TOTAL", requires you to add the numbers in each of the columns. With this example, 6 employees for licensed positions and 10 employees for unlicensed (documented) positions were subjected to tests. The total for that column would be 16 (i.e., 6 + 10). The same procedure should be used for each column. (i.e., add all the numbers in that column and place the answer in the last row).



Please note that the sample data collection form also has information for unlicensed (documented) employees on line two. The same procedures outlined for licensed employees should be followed for entering the data on unlicensed (documented) employees. With employees in unlicensed (documented) positions, 10 tests were conducted. The test result for 1 of the unlicensed (documented) employees was equal to or greater than 0.04. This information is entered in the row marked "Unlicensed (Documented)". No testing was done with the "Other" employee category so zeros (0's) were entered in those spaces.

Remember that the same procedures indicated above are to be used for completing all of the tables in Sections A and B.

Page 9 **TRAINING/EDUCATION** (Section C) requires information on the number of crewmembers and supervisory personnel who have received the required alcohol training during the current reporting period.

READ BEFORE COMPLETING THE REMAINDER OF THIS FORM:

1. All items refer to the **current** reporting period **only** (for example, January 1, 1993 - December 31, 1993).

2. This report is only for testing **REQUIRED BY THE UNITED STATES COAST GUARD (USCG)**:

   - Results should be reported only for employees in **COVERED POSITIONS** as defined by USCG alcohol testing regulations.

   - The information requested should only include testing for alcohol using the standard procedures required by USCG regulation 33 CFR Part 95 and 46 CFR Parts 4 and 16.

3. Include Information on completed tests only. Do not include refusals for testing.

4. Complete all items; DO NOT LEAVE ANY ITEM BLANK. If the value for an item is zero (0), place a zero (0) on the form.

A. MARINE EMPLOYEE TESTING INFORMATION

POST-ACCIDENT TESTING		
EMPLOYEE CATEGORY	NUMBER OF TESTS	NUMBER OF TEST RESULTS EQUAL TO OR GREATER THAN 0.04
Licensed		
Unlicensed (Documented)		
Other		
TOTAL		

REASONABLE CAUSE TESTING		
EMPLOYEE CATEGORY	NUMBER OF TESTS	NUMBER OF TEST RESULTS EQUAL TO OR GREATER THAN 0.04
Licensed		
Unlicensed (Documented)		
Other		
TOTAL		

B. TRAINING/EDUCATION

Training During Current Reporting Period

Number of crewmembers and supervisors who have received the required alcohol training pursuant to 46 CFR 16.401(b): [ ]

Issued on: December 2, 1992.

Andrew H. Card, Jr.,

Secretary of Transportation.

J. W. Kime,

Admiral, U.S. Coast Guard,

COMMANDANT.

[FR Doc. 92–29689–37 Filed 12–10–92: 10:00 am]

BILLING CODE [illegible]

federal register

Tuesday
December 15, 1992

Part IX

Department of Transportation

Federal Aviation Administration

14 CFR Part 121
Drug and Alcohol Testing Programs; Proposed Rules

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 121

Federal Highway Administration

49 CFR Parts 382 and 391

Federal Railroad Administration

49 CFR Part 219

Federal Transit Administration

49 CFR Part 653

Research and Special Programs Administration

49 CFR Part 199

Coast Guard

46 CFR Part 16

[OST Docket No. 48498, Notice 92-29]

RIN 2105-AB94

Random Drug Testing Program

AGENCY: Office of the Secretary, Federal Aviation Administration, Federal Highway Administration, Federal Railroad Administration, Federal Transit Administration, Research and Special Programs Administration, and the United States Coast Guard, DOT.

ACTION: Advance notice of proposed rulemaking (ANPRM).

SUMMARY: In response to public comments received during the President's regulatory moratorium, petitions submitted by industry, and on their own initiative, the five operating administrations that currently require random drug testing—the Federal Aviation Administration (FAA), the Federal Highway Administration (FHWA), the Federal Railroad Administration (FRA), the Research and Special Programs Administration (RSPA) and the United States Coast Guard (USCG) (collectively referred to as "DOT" or "the agencies")— are considering modifying the random drug testing program. [The Federal Transit Administration (FTA) —also a part of DOT—published elsewhere in today's **Federal Register** a drug testing NPRM that proposes to adopt, among other things, the 50 percent random testing rate that is currently used by the other operating administrations. This ANPRM is not intended to affect the random drug testing program to be established by that rulemaking. Rather, this ANPRM will review the general issue. FTA joins the other operating administrations in issuing this random drug testing program notice requesting public comment and data concerning whether there are less costly alternatives to the current random testing program that can maintain an adequate level of deterrence and detection of illegal drug use.

DATES: Comments are due February 16, 1993. A public meeting on technical and scientific issues will be held on February 1, 1992, from 8:30 a.m. to 5 p.m. and on February 2, 1992, from 8:30 a.m. to 12:30 p.m. Seating is limited to 150, which will be offered on a first-come, first-served basis.

ADDRESSES: Comments should be sent to Docket 48498, Office of Documentary Services (C-55), U.S. Department of Transportation, room 4107, 400 Seventh Street, SW., Washington, DC 20590-0001. To provide a copy for each operating administration's docket and to facilitate the Department's review, we request that an original and seven additional copies of each comment be submitted.

The technical meeting will be held at the Holiday Inn—Capitol, 550 C St., SW., Washington, DC 20024. (202) 479-4000. The hotel is offering participants a special rate, if they mention the meeting when they reserve their room.

FOR FURTHER INFORMATION CONTACT: Dr. Donna Smith, Acting Director, Office of Drug Enforcement and Program Compliance, (202) 366-3784.

SUPPLEMENTARY INFORMATION: The Department of Transportation seeks comment on the effectiveness of the current random drug testing program for transportation industry employees. In the April 1992 "Report to the President: Review of Regulations," DOT Secretary Card committed to review this issue and determine whether adequate deterrence and detection of illegal drug use could be achieved at a lower rate of random testing and at a lower cost. In addition, several petitions have been filed with various operating administrations seeking to simply lower the rate of random drug testing.

The purpose of this notice is to seek data and ideas on additional strategies that would ensure the continued effectiveness of the Department's anti-drug program while reducing its cost. The Department is reluctant to propose a specific change in random testing requirements at this time because of the lack of data for transportation industry workers and because most of the operating administration programs have only been in place for a short time. Other than the experience of the military services that was relied on when the operating administrations originally set their random testing rates at 50 percent, we are unaware of any long-term reliable data indicating the relative deterrent effectiveness of different random testing rates. However, as described later in this document, DOT is gathering data that may help on this issue. Although the anti-drug regulations have been promulgated by various DOT agencies, we are issuing a Departmental ANPRM because of the commonality of the issues. We invite comment and supporting data on whether different programs for different industries would be appropriate. We have numbered specific questions within brackets throughout the ANPRM, and would appreciate it if commenters would reference those numbers in their responses.

Regulatory Background

DOT agencies have been involved in drug testing since the mid-1980s. The USCG has tested its uniformed personnel for drug use since 1982. DOT began testing certain of its civilian employees in September 1987.

The Department's civilian employee program is tightly controlled, centrally administered by headquarters staff, and monitored daily. Employee awareness and the visibility of the program are maintained through training programs conducted by regional drug program coordinators. Specimens are collected by a single contractor service, which operates under a uniform standard of procedures that provides for consistent and reliable collections.

The random testing program was phased-in and, by September 1988, DOT was testing a population of nearly 33,000 employees (primarily air traffic controllers, safety inspectors and individuals with high security clearances) at a testing rate of at least 50 percent each year for illegal drug use. The annual rate of positive random tests has declined from about 0.83 percent to as low as 0.21 percent over the last five years. Over the past three years, the rate consistently stayed well below 0.5 percent. The reports indicated that in this homogeneous, skilled, and stable population, there was no distinction in the percentage of positive testing results based on geography, age, etc. As a result of the apparent deterrent effect of the testing program as demonstrated by carefully-maintained recordkeeping, long experience, and the decreasing number of positive results, the Department lowered its federal employee random testing rate this year. Effective March 1, 1992, the Department has been conducting random testing at a rate of at least 25 percent annually. The positive rate continues to remain at a similarly low level. The Department

will continue to evaluate the data and may adjust the random testing rate, if necessary, back to 50 percent. The Department estimates that the reduction in the testing rate will save approximately 20 percent of the annual collection and laboratory testing costs.

The Federal Railroad Administration (FRA) has the longest experience with drug testing programs applicable to transportation industry workers. In 1986, railroads began pre-employment, post accident, and reasonable cause/suspicion testing, as required by the FRA.

In 1988, the Department of Transportation issued six final rules mandating anti-drug programs for certain transportation workers in the aviation, interstate motor carrier, pipeline, maritime, rail and transit industries. The rules included requirements for education, training, testing and sanctions. The testing component of each program included pre-employment, post-accident, reasonable cause, periodic (for those subject to periodic medical examinations) and random drug testing for approximately four million workers in safety-sensitive positions. Based on extensive experience and success in testing military and other populations, the Department imposed widescale random testing requirements because unannounced random drug testing is generally regarded as the best method of deterring illegal drug use.

The operating administrations' rules imposed a random testing rate of at least 50 percent per year. This means that if an employer has 400 covered employees, the employer must conduct at least 200 tests per year. Selection for testing must be random, with every employee in the random pool having an equal chance of being chosen each time a selection is made. Because of the randomness, some employees could be tested more than once in a given year, while others might not be tested for years. However, every covered employee would know that he or she had one chance in two of being tested each year. Employers were allowed to phase-in random testing at a rate of 25 percent for the first year, but had to increase to at least a 50 percent rate after one year.

After the final rules were issued, lawsuits delayed implementation of the rules for three of the six DOT agencies. As of today, only transit workers are not covered by the testing regulations. The 1988 final rule adopted by the Federal Transit Administration (formerly called the Urban Mass Transportation Administration) was vacated by the United States Court of Appeals for the District of Columbia Circuit because of a lack of statutory authority. Legislation (the FTA provisions of the Omnibus Transportation Employee Testing Act of 1991, Pub. L. 102–143, Title V, October 28, 1991) was subsequently enacted to remedy this problem as well as address other significant concerns with alcohol abuse and illegal drug use by individuals in various transportation industries who perform safety-sensitive duties. An NPRM proposing to cover transit employees is published elsewhere in today's Federal Register. As proposed, transit employees would be subject to a random testing rate of at least 50 percent. As noted above, this ANPRM involves a longer-term review of random testing program issues and is not intended to affect the random rate decision that must be made as part of FTA's proposed rulemaking. Several other DOT agency-regulated industries or industry sectors only recently began random testing at a 50 percent rate per year.

The Federal Railroad Administration phased-in random testing in three groups: Large railroads, medium-size railroads, and short line railroads. In January 1990, large railroads began testing at 25 percent, medium-size railroads began testing at 25 percent in July 1990 and short line railroads began testing at 25 percent in November 1990. Random testing at a 50 percent rate began one year after these dates for each of the three categories.

In the aviation industry, the 25 percent rate was instituted for large air carriers in December 1989, for medium-size carriers in April 1990, and for the smallest carriers in August of 1990. Testing at 50 percent began one year after the initial phase-in. Testing of contractor employees (such as repair station personnel or security screeners) began one year after the carriers that they worked for or supported.

Testing of pipeline personnel began next. Phase-in (25 percent testing) began in April 1990 for large operators and in August 1990 for small operators, with the 50 percent rate implemented one year later by each group.

Random and non-suspicion-based post-accident drug testing in the motor carrier industry were enjoined by court order, although the other types of testing were implemented on December 21, 1989. After the injunction was lifted, random testing by large motor carriers began in November 1991 at a 25 percent rate and testing by small motor carriers began in January 1992 at a 25 percent rate. One year after these dates, the rate increases to 50 percent. (The current rule covers just interstate motor carriers, but a proposed rule in today's Federal Register would extend coverage to all holders of commercial driver's licenses, including employees of intrastate motor carriers and school bus drivers.)

The USCG rule regarding random testing of merchant seamen was enjoined by court order in December 1989. Other types of testing were phased-in commencing in June 1989. In July 1991, the USCG issued a revised rule addressing the court's concerns and justifying the categories of employees subject to random testing. In October of 1991, the maritime industry began testing at a 25 percent random rate with a requirement to increase to a 50 percent rate one year after implementation. There was no distinction between large and small maritime employers for this implementation of random testing.

Only the Federal Aviation Administration and the Federal Railroad Administration require their regulated employers to report testing statistics to them. The Federal Highway Administration, the U.S. Coast Guard and the Research and Special Programs Administration review records maintained by covered employers, but do not have composite data for all positive test results in their industries. Separate NPRMs published in today's Federal Register would require that the employers (or industries) regulated by all six operating administrations submit uniform data concerning drug testing on an annual basis to those administrations. (Data from the motor carrier industry would be gathered on a survey basis.)

Purpose of Random Testing

The primary purpose of the Department's anti-drug rules is to ensure safety by deterring drug use, with detection an important collateral benefit. The integrity of the random selection process, the timing of the collection, the use of correct collection procedures, and the credibility of the MRO (medical review officer) verification actions must be considered when assessing the effectiveness of any random testing program in deterring drug use and detecting drug users. When drug users go undetected because of errors in the selection, collection, or review processes, the deterrent value for that employee and others is strongly diminished.

Random testing to achieve deterrence is a form of drug use prevention. Prevention generally is carried out using one or more of four strategies: Education, persuasion, motivation, or facilitation. Many companies have an existing drug education program. Employer policies, supervisor training, and peer-identification programs are

examples of a persuasion strategy. Drug testing is usually considered a tool for a motivational strategy in drug use prevention. Comprehensive Employee Assistance Programs are a major component of a facilitation model. In our view, workplace drug use prevention programs should consist of a mix of the four prevention strategies. These strategies must maintain or increase the visibility of the program and, therefore, the employees' awareness of it. Different employers and different industries may find different mixes of education, persuasion, motivation, and facilitation more effective and efficient in deterring drug use.

As the Department noted during the drug testing rulemakings and as FRA found when it added random testing to an existing testing program, random testing does deter use. FRA and the military services noted reductions in the positive rates for other types of drug testing after starting random testing. The Department seeks comment and data on the minimum effective random testing rate.

[1] Does increasing or decreasing the testing rate affect an individual's perception of the chances of being "caught" and increase or decrease deterrence? Why?

[2] Is there a mathematical relationship between the testing rate and deterrence, e.g., does doubling the rate double the deterrence?

[3] How does the increase or decrease in the rate affect the costs of testing, considering constant costs that exist regardless of the testing rate?

[4] To the extent the rate of positive tests is not expected to increase with a random testing rate reduction, please explain why.

[5] What is the lowest testing rate at which the rate of positive tests will not increase over the current positive test rate and how is it determined?

Random testing also helps to identify and remove drug users from safety-sensitive positions. Sanctions against detected drug users serve as effective deterrents for others. With any given prevalence of drug use, the higher the random testing rate, the higher the number of drug users who will be detected. At present, DOT's regulations call for each covered employee to be subject to random testing at the same rate as all other covered employees of that employer. Testing must be based on random selection, and employers are not permitted to target individuals or employee groups for selection for ostensibly "random" testing.

To the extent that detection is an important goal, lowering the random testing rate reduces the percentage of the workers tested over a given period and, therefore, reduces the number of drug users that would be identified. For example, if one assumes four testing periods per year and testing takes place over three years, then the following fractions of a workforce would be tested at least once during the three years at the following different annual testing rates.

Annual testing rate (percent)	Percent of workforce tested in 3 years
100	96.8
75	91.7
50	79.9
25	53.9
10	26.2

Available Data

The Department would appreciate public comment in identifying data concerning the effectiveness of random testing rates. The following summarizes the data currently available to the Department concerning the results of random testing in the regulated industries, the Department's civilian workforce, and the U.S. Coast Guard uniformed service.

AVIATION

	1990	1991
Total number of random tests	84,481	169,240
Number of positives	446	1,232
Percent positive	0.53	0.73

Data on 1991 reflects the inclusion of contractors and some testing at a 50 percent rate.

RAILROADS

	1990	1991
Total number of random tests	35,228	50,436
Number of positives	365	447
Percent positive	1.04	0.88

FRA's random testing regulations were issued in November 1988, with the first testing, as noted earlier, starting in January 1990. FRA has kept records of post-accident drug testing for the last five years. For purposes of analyzing any effect from the issuance of the requirement or the implementation of the testing, the positive rates for post-accident testing are provided; they are as follows:

Percent				
1987	1988	1989	1990	1991
5.1	5.6	3.0	3.0	1.1

For similar purposes, the positive rates for reasonable cause testing are provided; they are as follows:

Percent				
1987	1988	1989	1990	1991
5.4	4.7	3.6	1.8	1.9

FRA is currently conducting an experimental study of eight railroads, comparing testing results at the 25 percent and 50 percent random testing rates. The study began in July 1991 and is expected to be completed in July 1993. Data from the first year of the study are now being analyzed and will be released to the public shortly. Initial indications are that the FRA data do not show an increase in positive rates for the railroads conducting random testing at the 25 percent rate. However, all of these railroads had implemented testing at a 50 percent rate for some period and then lowered it for the experimental program.

Motor Carriers

In audits of 8,384 motor carrier drug testing programs by FHWA in FY 1992, records indicated that 13,612 random tests were conducted. There were 289 verified positive results (2.12 percent). The audits represent less than 5 percent of motor carriers subject to the FHWA rule. The FHWA selects motor carriers for these general compliance investigations by determining factors such as a safety rating or prior compliance problem. These compliance investigations do not offer scientific, statistically unbiased sampling methods.

U.S. DOT Employees

In the Department's Federal employee testing program, the random testing rate of at least 50 percent was phased-in over the first year of the program and achieved at the end of FY 1988. A testing rate of at least 50 percent was maintained in FY 1989–1991. In FY 1992, the figures reflect testing over the first five months with a rate of at least 50 percent, followed by seven months of testing with a rate of at least 25 percent. (As noted earlier, DOT decided to lower its testing rate in 1992.) The following table summarizes DOT Federal employee random testing data.

	FY88	FY89	FY90	FY91	FY92
Total number of random tests	5,047	17,926	19,103	18,671	12,454
Number of positives	42	92	43	40	39
Percent positive	0.83	0.51	0.23	0.21	0.31

As noted earlier, the USCG has been conducting random drug tests on its active duty and reserve uniformed personnel. Rather than setting a specific testing rate as a requirement at the beginning of the fiscal year, the USCG conducts the maximum number of tests possible from the funds that are appropriated. The percentage of positive results for random tests in each fiscal year and the approximate testing rate was as follows:

Percent	1987	1988	1989	1990	1991	1992
Percent positive	1.57	1.31	0.68	0.41	0.41	0.78
Testing rate	120	95	95	95	85	85

Testing Rates in Various Federal Agencies

Executive Order 12564, "Drug-Free Federal Workplace", signed by President Reagan in September 1986, required random drug testing of safety- and security-related Federal employees in 135 Federal executive branch agencies. According to a 1991 report of the General Accounting Office ("Employee Drug Testing: Status of Federal Agencies' Programs: Report to the Chairman, Committee on Governmental Affairs," U.S. Senate, (May 1991), GAO/FFD–91–70, 14–19,) there is a wide variation in the random drug testing rates at the 18 agencies that GAO reviewed.

Alternatives

There are a number of alternatives to the current 50 percent random testing rate that DOT could consider. They include:

(1) Making an across-the-board modification of the rate for all DOT anti-drug programs;

(2) Modifying how the random testing rate is implemented (e.g., frequency of testing, etc.)

(3) Making a selective modification of the rate by

(a) Operating administration (e.g., FAA or FRA could modify its rate);

(b) Job category (e.g., pilots, train engineers);

(c) Any other category that warranted a different rate based on drug use prevalence or other factors (e.g., age or geographic region);

(4) Establishing a performance standard program (as discussed later);

(5) Permitting employers who take specified additional steps to deter drug use to reduce their random testing rate;

(6) Modifying the random testing rate for all operating administration rules for a specific time period, subject to reconsideration after the results are analyzed;

(7) Conducting demonstration programs in each operating administration before further action is taken; or

(8) Combining some of the alternatives.

[6] DOT requests comment on these alternatives and information on any other possible alternatives.

Modifying the random testing rate across-the-board in each operating administration would result in the simplest rule and program changes and would be the easiest to enforce. Lowering the rate could reduce costs significantly with an undetermined impact on deterrence, but it would unavoidably result in less detection of drug users. Some argue that what data DOT has show very low positive rates and, therefore, the random testing rate can be reduced.

[7] Is the rate of positive test results low because the 50 percent testing rate is the minimum effective deterrent?

[8] Does a low rate of positives alone warrant a change? Does this make the rate "acceptable" for safety purposes?

[9] Is detecting fewer users acceptable even though the positive rate is the same?

Changes in how random testing is implemented in the workplace may be another approach to maintaining deterrence at a lower testing rate. For example, increasing the number of times random testing is conducted during the year may serve to increase awareness and visibility of the testing program, thus maintaining effective deterrence even though the actual number of employees tested is decreased. Procedures that ensure each person randomly selected is actually tested (*e.g.*, if a selected employee is not available, the name would be kept confidential until the employee is available for testing), as opposed to random testing procedures that allow selected individuals to "be excused" because of temporary unavailability, may also serve to maintain effective deterrence by making it more difficult for drug users to avoid detection. A policy that requires a re-collection of a specimen from a selected individual when a random test has been cancelled or the results invalidated would help deter individuals from adulterating their specimens or otherwise obstructing the testing process.

Authorizing variable random rates among operating administrations or within a workplace is another option to consider in improving deterrence and detection while reducing the overall random rate. Employers could test certain categories of employees at higher rates based on prevalence or incidence differences in the population. For example, if prevalence of drug use is greater among mechanics than among flight attendants, the employer could test mechanics at a 50 percent rate and flight attendants at a 20 percent rate. Variable rates enable deterrence and detection efforts to be targeted where drug use is most likely. A variable rate strategy, however, should be based on prevalence and incidence data, not individualized suspicion or personal characteristics. Such an approach would require employers to maintain several random pools and systematically determine drug use prevalence and incidence data, something especially difficult for small firms. This approach may present compliance and enforcement difficulties.

Another of the options DOT is exploring is use of a "performance standard" for establishing random testing rates for a specified group such as an industry, a job category, or an individual employer. The group's overall rate of testing would be determined by the success of the group in deterring drug use as measured by its rate of positive random tests. For example, if a group's positive rate is less than one percent over a given period of time, the group could be permitted to

reduce the random testing rate (*e.g.*, to 25 percent or 10 percent.) If the positive rate increased under a reduced random testing rate, the group would be required to return to a higher random testing rate. The advantage of this approach is that it could lower costs to large segments of the transportation industry, if groups could maintain low positive rates. It would also provide an incentive to achieve low positive rates, the ultimate objective of DOT's program, and would reward those groups with effective programs. Such an approach would also encourage such groups to use whatever additional steps other than testing that are appropriate in their situation, perhaps resulting in more effective programs. For example, some groups may find increased education helpful in increasing the effectiveness of their anti-drug programs.

There are many potential obstacles to implementing such an approach. It would require collection of additional testing data from each group that might offset savings in testing costs. Although this may not be a difficulty for some operating administrations, it may be more problematic in others. In the motor carrier industry, for example, even if the reports could be submitted, it is not clear that FHWA could effectively review and respond to reports from hundreds of thousands of motor carriers on millions of employees. From the Department's point of view, a performance standard program would be harder to administer because the operating administrations would have to monitor both positive rates and random testing rates for every affected group to ensure proper compliance. In addition, it may be difficult to effectively apply a low random testing rate in small companies. (For example, if a company with one or two employees had to test at only 10 percent, employees might not be deterred if they knew the next test might not be for five or six years—and DOT would not get any reports to determine whether the rate of positive test results was being kept low.) Finally, there would be less detection of drug users at a lower rate. The Department is also concerned with whether this type of performance standard would be an incentive to cheating. Employers might be tempted to falsify test results that were positive in order to maintain a reduced random testing rate.

As another approach, the Department could consider reducing the random testing rate but requiring additional steps such as increased education. Or, it could offer a lower rate to those employers that took extra steps to increase deterrence.

Another approach would be to conduct a demonstration program in each operating administration. FRA is currently in the middle of such a program. These studies could include pilot projects that explore positive rates in relationship to different random testing rates. Demonstration programs that include other deterrent or prevention initiatives in addition to random testing could explore the relationship among education, training and awareness strategies and the random testing rate. Pilot studies have the advantage of examining specific variables in relationship to deterrence and detection outcomes in a controlled study environment.

As discussed earlier, there are many alternative methods in addition to testing to deter illegal drug use, including education.

[10] Which methods do commenters believe to be the most effective? What is the basis for your belief?

[11] Should the Department mandate use of one or more of these methods in addition to current requirements in the anti-drug rules, or should it leave it up to the discretion of employers as a supplement to a testing program? Why?

In an attempt to explore the relevant research, random testing implementation strategies, and drug deterrence methodologies, to help it in this rulemaking, the Department will convene a conference on workplace random testing and drug deterrence. The conference will be open to the public. Details on the conference agenda, date and location will be offered in a subsequent announcement. Information gathered from the conference will be considered along with comments received on this ANPRM in determining the next appropriate action.

Additional Questions

The Department would appreciate commenters responding to the following additional questions and providing whatever data or studies might support their position.

[12] Should other factors apply to any decision to adjust the random testing rate besides deterrence, detection, and costs? What are they and why are they relevant?

[13] What data would justify a change? Are low positive rates alone sufficient? How do we determine if positive rates are low because the 50 percent testing rate is acting as a deterrent?

[14] What is the effect of the quality of the selection and collection process on the positive rates that are currently being produced? As the selection and collection processes improve with experience or enforcement, will the positive rates be higher? How should any potential for increased detection with improved collection affect any decision concerning the random testing rate?

[15] Can performance-based programs be developed, operated, and audited within the currently operating consortia programs? If so, how? Does participation in a consortium exacerbate the problems associated with implementation and enforcement of a performance standard for random rates?

[16] If analysis of positive rates is necessary before a decision can be made to reduce the random testing rate, for how long a period must DOT have data? What should DOT do about those industries for which it currently has little or no data? Should operating administrations that have reliable, accurate data consider taking action now? Elsewhere in today's **Federal Register** we are proposing extensive data collection for all six operating administrations. This data would not, however, be available for some time.

[17] What if positive rates were to increase after DOT lowered the random testing rate? Is some increase in the rate of positive tests acceptable? How much and why? Are there other reasons the rate could rise beside the lower random test rate?

[18] What cost reductions could be expected if the random testing rate is reduced to 25 percent? 10 percent? What is the basis for these estimates? Even if some increase in positive rates is expected with a lower random testing rate, is a reduction in the random testing rate nevertheless justified based on reduced costs? Please explain.

[19] Are there offsetting cost increases that could occur at a reduced random testing rate (*e.g.*, consortium cost per test, more accidents)?

[20] If a change is made, should it apply equally to all of the DOT operating administrations' programs, or only as justified by operating administration specific data? If particular industries, segments of industries or particular employers achieve very low positive rates, should they be allowed to have different testing rates? Could this be effectively implemented? Should random testing rates be linked to drug use in particular groups based on prevalence or incidence data available for such groups (*i.e.*, age groups, occupational categories, specific types of worksites?)

[21] What additional means of increasing deterrence are available to the government and industry to supplement random drug testing? How

would these strategies work? What would they cost? What is the evidence they work?

[22] How might DOT restructure its requirements for drug use prevention programs to maximize the efficiency and effectiveness of prevention within the transportation industry?

[23] Could a "performance standard" work? Would there be too much incentive for some groups to cheat? How could DOT effectively implement or enforce such a standard, especially for motor carriers? Is the data collection that would be required more trouble and expense than conducting a higher rate of random tests? Would the trouble and expense vary by operating administration? Please comment on the difficulties in administering such a program and the increase in enforcement oversight that would be required. How could it effectively be implemented for small companies? Would it work if implemented industry-by-industry or among segments of a given industry? Could it be effectively implemented and enforced employer-by-employer?

[24] Any reduction in the random testing rate will result in less detection. The lower the rate, the less the detection. Are there alternative approaches apart from random testing that could offset potential reductions in detection? What is their projected efficiency and effectiveness, compared with current programs? What would they cost? What is the basis of the numbers? Are there safety implications?

[25] Are there any additional data or studies concerning rates of drug testing and deterrence that may be relevant to the Department's consideration?

[26] Should each operating administration conduct a demonstration program to gather data on the relative effectiveness of different rates specific to its regulated industry? What outcome measures would be appropriate in such pilot programs?

[27] Should one or more operating administrations reduce the random testing rate for a specific time period and then analyze the results? What period of time is adequate for determining the impact on deterrence?

Regulatory Analyses and Notice

DOT Regulatory Policies and Procedures

The ANPRM is considered to be a significant rulemaking under DOT Regulatory Policies and Procedures, 44 FR 11034, because of the substantial public and Congressional interest in this subject. It is difficult to estimate potential costs or benefits at this time because the Department is not proposing specific options.

Executive Order 12612

This ANPRM has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that it does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12630

This ANPRM has been analyzed in accordance with the principles and criteria contained in Executive Order 12630, and it has been determined that any potential modification in the random drug testing program does not pose the risk of a taking of constitutionally protected private property.

Regulatory Flexibility Act

Depending on what, if any, action is ultimately proposed and adopted, a potential modification in the random drug testing program could have a significant economic impact on a substantial number of small entities. The Department specifically seeks public comment on the effect, if any, of potential changes in the program on small entities as well as any suggested alternative approaches. Further review will be conducted based on comments received on this notice and when, and if, a notice of proposed rulemaking is issued.

Paperwork Reduction Act

There are a number of reporting or recordkeeping requirements associated with DOT-mandated drug testing. Because the purpose of this notice is to solicit information, no specific changes are being proposed at this time. The Department notes that effective implementation of possible alternatives and the gathering of data necessary to justify any changes, compare alternatives, or permit the implementation of some approaches may require recordkeeping and reporting by the affected industries. We are proposing substantial data collection concerning drug testing elsewhere in today's **Federal Register**.

National Environmental Policy Act

The Department has determined that this rulemaking is not a major Federal action significantly affecting the quality of the human environment and that an environmental impact statement is not required.

Authority: FAA—49 U.S.C. App. 1354(a), 1355, 1356, 1357, 1401, 1421–1430, 1472, 1485, 1502; 49 U.S.C. 106(g) revised, Pub. L. 97–449, January 12, 1983.

FHWA—49 U.S.C. 504 and 3102; 49 CFR 1.48.

FRA—45 U.S.C. 431, 437, 438, as amended; Pub. L. 100–342, Pub. L. 102–143; and 49 CFR 1.49(m).

FTA—49 CFR 1.51, Pub. L. 102–143.

RSPA—49 App. U.S.C. 1672, 1674a, 1681, 1804, 1808, 2002, 2040; 49 CFR 1.53.

USCG—46 U.S.C. 2103, 3306, 7101, 7301, 7701; 49 CFR 1.46.

Multi-modal ANPRM on Random Drug Testing Program.

Issued on December 2, 1992, in Washington, DC.

Andrew H. Card, Jr.,

Secretary.

Thomas C. Richards,

Administrator, Federal Aviation Administration.

Thomas D. Larson,

Administrator, Federal Highway Administration.

Gilbert E. Carmichael,

Administrator, Federal Railroad Administration.

Brian W. Clymer,

Administrator, Federal Transit Administration.

Douglas B. Ham,

Acting Administrator, Research and Special Programs Administration.

Admiral J. William Kime,

Commandant, United States Coast Guard.

[FR Doc. 92–29690 Filed 12–10–92; 10:00 am]

BILLING CODE 4910–62–M

Federal Register

Tuesday
December 15, 1992

Part X

Department of Housing and Urban Development

Office of the Assistant Secretary for Administration

48 CFR Parts 2401, et al.
HUD Acquisition Regulation (HUDAR); Final Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Administration

48 CFR Parts 2401, 2402, 2403, 2405, 2406, 2409, 2413, 2414, 2415, 2416, 2419, 2425, 2426, 2428, 2432, 2433, 2436, 2437, 2446, 2452

[Docket No. R–92–1600; FR–2473–F–02]

RIN 2535–AA16

HUD Acquisition Regulation (HUDAR)

AGENCY: Office of the Assistant Secretary for Administration, HUD.

ACTION: Final rule.

SUMMARY: This rule makes final a proposed rule published for comment on June 8, 1992 (57 FR 24334) amending the HUD Acquisition Regulation (HUDAR). The final rule also contains amendments not proposed on June 8, 1992 regarding the procurement activities of the Government National Mortgage Association (GNMA).

EFFECTIVE DATE: January 14, 1993.

FOR FURTHER INFORMATION CONTACT: Edward L. Girovasi, Jr., Director, Policy and Evaluation Division, Office of Procurement and Contracts, room 5262, 451 Seventh Street, SW., Washington, DC 20410–3000 (voice (202) 708–0294, TDD (202) 708–1112). (These are not toll-free numbers.)

SUPPLEMENTARY INFORMATION: The information collection requirements contained in this rule have been approved under the Paperwork Reduction Act of 1980 by the Office of Management and Budget (OMB), and have been assigned OMB control number 2535–0091.

Background

The uniform regulation for the procurement of supplies and services by Federal departments and agencies, the Federal Acquisition Regulation (FAR), was promulgated on September 19, 1983 (48 FR 42102). The FAR is codified in title 48, chapter 1, of the Code of Federal Regulations. The HUD Acquisition Regulation (HUDAR), which implements the FAR, is codified in title 48, chapter 24 of the Code of Federal Regulations.

On June 8, 1992 (57 FR 24334), HUD proposed amendments to the HUDAR to update existing coverage and to include additional necessary procedures to reflect recent changes to the Federal Acquisition Regulation (FAR). No comments were received during the public comment period, which ended August 7, 1992. This rule makes final the amendments, as revised, proposed on June 8.

Amendments Not Contained in Proposed Rule

The final rule also contains amendments to the HUDAR necessary to implement a policy by the Department that all procurement activities by the Government National Mortgage Association (GNMA), with the exception discussed later in this preamble, must be awarded in conformance with the FAR, the HUDAR, and the Federal Information Resources Management Regulations (FIRMR).

The HUDAR currently provides that the procurement authority of the President of GNMA, with respect to requirements related to GNMA's programmatic functions, is exempt from the HUDAR. The Department has determined that all GNMA acquisitions must be conducted in accordance with the FAR, the HUDAR, and the FIRMR, with the exception of (1) transactions with issuers of mortgage-backed securities, including subissuers (or subservicers) acting in place of defaulted or otherwise terminated issuers, in furtherance of GNMA's guaranty of those securities under section 306(g) of the National Housing Act, and (2) transactions involving the sale or guaranty of financial instruments. Changes to §§ 2401.601–70, 2401.601–72, and 2402.101 are being made to implement this policy.

In addition to the amendments with respect to GNMA, technical corrections are being made in the final rule to §§ 2401.601–71, 2401.603–2, 2402.101, 2403.670, 2406.304–71(c), 2415.604(b), 2415.608(a), 2415.612–70, and 2452.203–71. These corrections are necessary to correspond to the changes contained in the June 8, 1992 proposed rule.

The Department's regulations on rulemaking at 24 CFR part 10 provide that a rule will be published for public comment before issuing the rule for effect. However, part 10 provides for exceptions from that general rule when the Department finds good cause to omit advance notice and public participation. The good cause requirement is satisfied when prior public participation is "impracticable, unnecessary, or contrary to the public interest." (24 CFR 10.1) The Department finds that good cause exists to publish the amendments for effect without first soliciting public comment because the prior public participation is unnecessary. The amendments are for the purpose of implementing changes in the internal organization of the Department with regard to GNMA's procurement authority, and technical changes necessary to conform certain sections to the amendments proposed on June 8, 1992.

Other Matters

Paperwork Reduction Act

The information collection requirements contained in this rule were approved under the Paperwork Reduction Act of 1980 by OMB, and were assigned control number 2535–0091.

National Environmental Policy Act

A Finding of No Significant Impact with respect to the environment as required by the National Environmental Policy Act (42 U.S.C. 4321–4374) (NEPA) is unnecessary, since the activities described in this rule are categorically excluded from the Department's NEPA procedures under 24 CFR 50.20(k).

Executive Order 12291, Federal Regulation

This rule does not constitute a "major rule" as that term is defined in section 1(b) of Executive Order 12291, Federal Regulation, issued by the President on February 17, 1981. An analysis of the rule indicates that it will not (1) have an annual effect on the economy of $100 million or more; (2) cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) have a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this rule before publication and by approving it certifies that this rule will not have a significant economic impact on a substantial number of small entities because the changes relate to the internal organization of HUD and conform the HUDAR to the FAR.

Executive Order 12612, Federalism

The General Counsel, as the Designated Official under Section 6(a) of Executive Order 12612, Federalism, has determined that the policies contained in this rule will not have substantial direct effects on States or their political subdivisions, or the relationship between the Federal government and the States, or on the distribution of

power and responsibilities among the various levels of government. The rule updates the HUD Acquisition Regulation (HUDAR) to reflect recent changes to the Federal Acquisition Regulation (FAR) and makes technical corrections to the agency's regulation. As a result, the rule is not subject to review under the Order.

Executive Order 12606, The Family

The General Counsel, as the Designated Official under Executive Order 12606, The Family, has determined that this rule will not have potential for significant impact on family formation, maintenance, and general well-being, and, thus, is not subject to review under the Order. The rule involves Departmental procurement procedures.

Semiannual Agenda of Regulations

This rule was listed as Item No. 1488 in the Department's Semiannual Agenda of Regulations published on November 3, 1992 (57 FR 51392, 51432) pursuant to Executive Order 12291 and the Regulatory Flexibility Act.

List of Subjects in 48 CFR Parts 2401, 2402, 2403, 2405, 2406, 2409, 2413, 2414, 2415, 2416, 2419, 2425, 2426, 2428, 2432, 2433, 2436, 2437, 2446, 2452

Government procurement, HUD acquisition regulations.

Accordingly, title 48, chapter 24 of the Code of Federal Regulations, is amended as follows:

SUBCHAPTER A—GENERAL

PART 2401—FEDERAL ACQUISITION REGULATION SYSTEM

1. The authority citation for 48 CFR part 2401 is revised to read as follows:

Authority: 40 U.S.C. 486(c); 42 U.S.C. 3535(d).

2401.601–70 [Amended]

2. Section 2401.601–70 is revised to read as follows:

2401.601–70 Senior Procurement Executive.

The Assistant Secretary for Administration is the Department's Senior Procurement Executive and is responsible for all Departmental procurement policy, regulations, and procedures, except for internal procedures related to procurement transactions conducted by the Government National Mortgage Association. The Senior Procurement Executive is also responsible for the development of HUD's procurement system standards, evaluation of the system in accordance with approved criteria, enhancement of career management of the procurement work force, and certification to the Secretary that the Department's procurement system meets approved criteria.

2401.601–71 [Amended]

3. Section 2401.601–71 is revised to read as follows:

2401.601–71 Office of Procurement and Contracts.

Except as provided otherwise is this chapter, the Office of Procurement and Contracts, in the Office of the Assistant Secretary for Administration, is responsible for all Departmental procurement.

2401.601–72 [Removed]

4. Section 2401.601–72 is removed.

2401.601–73 [Redesignated as 2401.601–72 and amended]

5. Section 2401.601–73 is redesignated as 2401.601–72 and revised to read as follows:

2401.601–72 Government National Mortgage Association.

(a) The President, GNMA, may exercise authority under section 306(g) of the National Housing Act and 24 CFR part 390 to enter into agreements with the issuers of mortgage-backed securities. The FAR and the HUDAR do not apply to these transactions, including the assignation of servicing requirements to a substitute servicer or issuer in the event of a default by, or other termination of, an issuer.

(b) Sales or guarantees of securities by GNMA are outside the scope of this part.

(c) All contracts that are not within the scope of paragraphs (a) and (b) of this section, and that are for the acquisition of supplies and services, shall be awarded in conformance with the FAR and HUDAR and, as appropriate, the FIRMR.

2401.601–74 [Redesignation as 2401.601–73 and amended]

6. Section 2401.601–74 is redesignated as 2401.601–73 and revised to read as follows:

2401.601–73 Regional Offices.

(a) Procurement of supplies and services for HUD Regional requirements is accomplished at each Regional Office by the Regional Contracting Division, which may redelegate contracting authority to qualified employees in Regional and Field Offices.

(b)(1) The Regional Administrator shall redelegate to Field Office Directors of Housing Management the following procurement authority related to the management or disposition of properties owned or held by HUD as mortgagee-in-possession under the National Housing Act (12 U.S.C. 1701–1749):

(i) Emergency procurement authority (pursuant to FAR 6.302–2); and

(ii) In those Field Offices without full-time contracting personnel, small purchase authority (pursuant to FAR part 13).

(2) The Regional Administrator may also redelegate small purchase authority to Office of Housing employees designated by the Field Office Director of Housing Management in those Field Offices without full-time contracting personnel.

(c) Any redelegation of procurement authority in paragraphs (a) and (b) of this section shall be accomplished on a Standard Form 1402, Certificate of Appointment, which may be revoked upon a showing that the individual has consistently failed to adhere to sound procurement practices. Any revocation of authority in (b) above shall only occur after consultation with the Assistant Secretary for Housing-Federal Housing Commissioner.

2401.603–2 [Amended]

7. Section 2401.603–2, paragraph (c) is revised to read as follows:

2401.603–2 Selection.

* * * * *

(c) Training courses as prescribed by the Senior Procurement Executive.

* * * * *

2401.603–3 [Amended]

8. Section 2401.603–3, paragraph (b) is amended by removing the words "Field Office Managers or Supervisors" and adding, in their place, the words "Appointing officials."

PART 2402—DEFINITIONS OF WORDS AND TERMS

9. The authority citation for 48 CFR part 2402 is revised to read as follows:

Authority: 40 U.S.C. 486(c); 42 U.S.C. 3535(d).

2402.101 [Amended]

10. In section 2402.101, under the definition "Head of Contracting Activity," paragraph (2) is revised, paragraphs (3), (4), and (5) are removed, paragraph (6) is redesignated as paragraph (3) and revised, and a new definition is added in alphabetical order, to read as follows:

2402.101 Definitions.

* * * * *

Head of Contracting Activity is defined in accordance with the FAR.

The following HUD officials are designated HCAs:

* * * * *

(2) The Regional Directors, Offices of Administration, for Regional Office procurements, which authority may be redelegated to the Director, Regional Contracting Division;

(3) The President, Government National Mortgage Association (GNMA), for procurement transactions that are conducted by GNMA in accordance with 2401.601–72(c).

* * * * *

Source Selection Official (SSO)—means the head of the funding office, or designee.

PART 2403—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

11. The authority citation for 48 CFR part 2403 is revised to read as follows:

Authority: 42 U.S.C. 3535(d).

Subpart 2403.3—[Amended]

12. The heading for subpart 2403.3 is amended by removing the words "Identical Bids and".

13. A new section 2403.670 is added to subpart 2403.6, to read as follows:

2403.670 Solicitation Provision and Contract Clause.[1]

Insert the clause at 2452.203–70 in all solicitations and contracts, and the provision at 2452.203–71 in all solicitations.

SUBCHAPTER B—COMPETITION AND ACQUISITION PLANNING

PART 2405—PUBLICIZING CONTRACT ACTIONS

14. The authority citation for 48 CFR part 2405 is revised to read as follows:

Authority: 42 U.S.C. 253; 40 U.S.C. 486(c); 42 U.S.C. 3535(d); and FAR class deviation approved November 15, 1990.

15. Subpart 2405.3, consisting of section 2405.301, is added, to read as follows:

Subpart 2405.3—Synopses of Contract Awards

2405.301 General

(b) All contract awards exceeding the small purchase limitation shall be synopsized in the Commerce Business Daily, without exception.

[1] This HUDAR provision/clause has been submitted to the FAR Secretariat for consideration as FAR coverage with Governmentwide application. In the event that similar FAR coverage is issued, HUD will rescind the corresponding HUDAR text.

PART 2406—COMPETITION REQUIREMENTS

16. The authority citation for 48 CFR part 2406 is revised to read as follows:

Authority: 42 U.S.C. 253; 40 U.S.C. 486(c); 42 U.S.C. 3535(d).

2406.304–70 [Removed]

17. Section 2406.304–70 is removed.

2406.304–71 [Redesignated as 2406.304–70]

18. Section 2406.304–71 is redesignated as 2406.304–70.

19. Section 2406.304–72 is redesignated as 2406.304–71, and paragraph (c) is revised to read as follows:

2406.304–71 Approval of the justification—Procurement Review Board.

* * * *

(c) Regional Administrators-Regional Housing Commissioners may provide for the operation of Regional Procurement Review Boards.

PART 2409—CONTRACTOR QUALIFICATIONS

20. The authority citation for 48 CFR part 2409 is revised to read as follows:

Authority: 40 U.S.C. 486(c); 42 U.S.C. 3535(d).

2409.501 [Removed]

21. Section 2409.501 is removed.

2409.502 [Amended]

22. Section 2409.502 is amended by removing the words "consulting services" and adding, in their place, the words "advisory and assistance services".

23. A new section 2409.503 is added, to read as follows:

2409.503 Waiver.

The Senior Procurement Executive is authorized to waive any general rule or procedure in FAR Subpart 9.5 by determining that its application to a particular situation would not be in the Government's interest.

2409.504 [Amended]

24. Section 2409.504 is amended by revising the introductory text to read as follows:

2409.504 Contracting officer responsibilities.

The following actions are required for all contract actions covered by 2409.502:

* * * * *

SUBCHAPTER C—CONTRACTING METHODS AND CONTRACTING TYPES

PART 2413—SMALL PURCHASE AND OTHER SIMPLIFIED PURCHASE PROCEDURES

25. The authority citation for 48 CFR part 2413 is revised to read as follows:

Authority: 40 U.S.C. 486(c); 42 U.S.C. 3535(d).

26. In section 2413.505–2, paragraph (b) is revised to read as follows:

2413.505–2 Agency order forms in lieu of Optional Forms 347 and 348.

* * * * *

(b) For small purchase under the Acquired Property Program, Contracting Officers may use HUD Form 2542, Purchase Order and Payment Authorization. This form may also be used for the following:

(1) Construction work under the small purchase limitation; however, if over $2,000, the Davis-Bacon Act and related requirements/clauses are applicable; or

(2) Services, including indefinite delivery purchase orders; however, if over $2,500, the Service Contract Act and related requirements/clauses are applicable.

PART 2414—SEALED BIDDING

27. The authority citation for 48 CFR part 2414 is revised to read as follows:

Authority: 41 U.S.C. 253; 42 U.S.C. 486(c); 42 U.S.C. 3535(d).

28. Section 2414.406–3 is revised to read as follows:

2414.406–3 Other mistakes disclosed before award.

(e) The determination to allow a bidder to: Correct a mistake in bid discovered before award (other than obvious clerical errors); withdraw a bid; or, neither correct nor withdraw a bid shall be submitted to the Head of the Contracting Activity for approval.

PART 2415—CONTRACTING BY NEGOTIATION

29. The authority citation for 48 CFR part 2415 is revised to read as follows:

Authority: 41 U.S.C. 253; 40 U.S.C. 486(c); 42 U.S.C. 3535(d).

30. In section 2415.407, paragraph (a) is revised to read as follows:

2415.407 Solicitation provisions.

(a) The Contracting Officer shall insert a provision substantially the same as the provision at 2452.215–70, Proposal Content and Outline, in all negotiated solicitations above the small purchase limitation. Include Section 6 in paragraph (b) of the provision if the

solicitation requires work on or access to sensitive automated systems and HUDAR clause 2452.237–76 is included.

* * * * *

31. Section 2415.604 is revised to read as follows:

2415.604 Responsibilities.

(b) For procurements of $500,000 or more, the technical requirements related to source selection shall be performed by a Source Evaluation Board (SEB), as described in 2415.612. For procurements under $500,000, the technical requirements related to source selection shall be performed by a Technical Evaluation Panel (TEB); except that an SEB may be used for procurements under $500,000 at the request of the head of the funding office.

32. In section 2415.608, paragraph (a) is revised to read as follows:

2415.608 Proposal evaluation.

(a)(2) *Technical evaluation.* The technical evaluation shall assign each proposal a score on the basis of the factors specified in the solicitation. The technical evaluation shall identify each proposal as being either acceptable or unacceptable. A proposal shall be considered unacceptable if it is so clearly deficient that it cannot be corrected through written or oral discussions. Predetermined cut-off scores designed to determine a threshold level of acceptability of proposals shall not be employed.

(3) A technical evaluation report shall be prepared and signed by the technical evaluator or evaluators, furnished to the Contracting Officer, and maintained as a permanent record in the official procurement file. In addition to the documentation listed in FAR 15.608(a)(2) (i)–(iv), the report shall include:

(i) The score of each proposal;

(ii) A narrative evaluation specifying the strengths and weaknesses of each proposal;

(iii) Any reservations or qualifications that may bear upon the selection of a source or sources for negotiation and/or award;

(iv) Specific technical reasons supporting a determination of unacceptability with respect to any proposal; and

(v) Score sheets of all evaluators.

* * * * *

2415.611 [Removed]

33. Section 2415.611 is removed.

2415.611–70 [Removed]

34. Section 2415.611–70 is removed.

35. Section 2415.613 is redesignated as section 2415.612 and revised to read as follows:

2415.612 Formal source selection.

(b) *Responsibilities.* (1) Selection of the source(s) for award shall be made by the Source Selection Official (SSO), who is the head of the funding office, or by his or her designee.

(2) To assist the SSO in evaluating proposals and making the selection, the SSO shall designate a Source Evaluation Board (SEB) composed of a chairperson, voting members, and advisors.

36. Section 2415.613–70 is redesignated as 2415.612–70 and revised to read as follows:

2415.612–10 Procedures.[2]

(a) *Evaluation.* (1) After the date for receipt of proposals, the Contracting Officer will forward copies of the technical portion of each proposal to the SEB Chairperson or his or her designee, who shall be responsible for custody of the proposals throughout the evaluation process. The cost portion of each proposal shall be retained by the Contracting Officer pending initial technical evaluation by the SEB.

(2) The SEB shall conduct a technical evaluation of each proposal in accordance with the requirements in 2415.608(a)(2).

(3) After the initial technical evaluation, the Contracting Officer and the SEB shall evaluate the cost portion of each proposal.

(b) *Competitive range.* Unless the SEB is prepared to recommend, in accordance with FAR 15.610(a)(3), that the award be made on the basis of the most favorable initial proposal, the Contracting Officer shall, with the advice of the SEB, establish a competitive range based on evaluation of all the factors for award, including cost or price.

(c) *Written or oral discussions.* The Contracting Officer, with the assistance of the SEB, shall conduct written or oral discussions with all offerors within the competitive range, as required by FAR 15.610.

(d) *Source selection decision.* The SEB shall document its selection recommendation or recommendations in a final report addressed to the SSO. The report shall contain the documentation specified in 2415.608(a)(3).

2415.613–71 [Removed]

37. Section 2415.613–17 is removed.

[2] This HUDAR provision/clause has been submitted to the FAR Secretariat for consideration as FAR coverage with Governmentwide application. In the event that similar FAR coverage is issued, HUD will rescind the corresponding HUDAR text.

38. A new section 2415.613 is added to read as follows:

2415.613 Alternative source selection procedures.

(a) The Department of Housing and Urban Development uses procedures authorized by FAR 15.613 for all research and development contracts and other contracts where the contractor's proposed methodology of carrying out the work is a significant selection factor.

(b) These procedures allow for limited oral or written discussions to avoid technical leveling, a request for best and final offers, and selection of source(s) for negotiation of a final contract.

39. A new section 2415.613–70 is added to read as follows:

2415.613–70 Technical evaluation.

Depending on the anticipated dollar value of the procurement (see 2415.604 and 2415.612(a)), either a TEP or SEB shall perform the required technical evaluation of proposals received in accordance with 2415.608 and 2415.612, respectively.

40. A new section 2415.613–71 is added to read as follows:

2415.613–71 Limited written or oral discussions.

Limited written or oral discussions shall be conducted with each offeror considered to be within the competitive range. These discussions should address technical weaknesses of the particular offer, as well as cost issues, to the fullest extent practicable while avoiding technical leveling.

41. A new section 2415.613–72 is added to read as follows:

2415.613–72 Selection and final negotiation.

(a) *Selection.* After the close of discussions and receipt of best and final offers, the TEP or SEB shall perform a final evaluation and prepare its selection recommendation for the contracting officer or SSO, respectively. Based on this evaluation, the contracting officer or SSO shall select for final contract negotiation the offeror(s) whose proposal is most advantageous to the Government in terms of price/cost, technical and other relevant factors included in the solicitation.

(b) *Final negotiation.* This includes reaching agreement with the selected source on any remaining cost/price, technical, socioeconomic, or other issues that will condition performance of the contract and setting forth those terms and conditions in a mutually acceptable contract document. No factor or condition that could have had any effect on the selection process may be

changed at this point. These negotiations are led by the contracting officer and may include any technical, audit, or support personnel he/she deems necessary.

PART 2416—TYPES OF CONTRACTS

42. The authority citation for 48 CFR part 2416 is revised to read as follows:

Authority: 42 U.S.C. 3535(d).

43. Section 2416.504 is revised to read as follows:

2416.504 Indefinite-quantity contracts.

(e) The contracting officer shall insert the clause at 2452.216–75, Unpriced Task Orders, in contracts for which task orders are individually negotiated and there may be a need to issue unpriced task orders; provided, however, that the contracting officer shall ensure that the cost of the work authorized by the task order is not in excess of the funds obligated under the contract.

SUBCHAPTER D—SOCIOECONOMIC PROGRAMS

PART 2419—SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS CONCERNS

44. The authority citation for 48 CFR part 2419 is revised to read as follows:

Authority: 40 U.S.C. 486(c); 42 U.S.C. 3535(d).

45. Subpart 2419.7, consisting of section 2419.708, is added to read as follows:

Subpart 2419.7—Subcontracting with Small Businesses and Small Disadvantaged Business Concerns

2419.708 Solicitation Provisions and Contract Clauses.[3]

(d) The Contracting Officer shall insert the provision at 2452.219–70 in negotiated solicitations exceeding $500,000 that are not set aside for small business or 8(a) concerns.

(e) The Contracting Officer shall insert the provision at 2452.219–70 with Alternate I in sealed bid solicitations exceeding $500,000 that are not set aside for small business or 8(a) concerns.

46. A new part 2425, consisting of section 2425.402, is added to read as follows:

[3] The coverage provided in paragraphs (d) and (e) have been submitted to the FAR Secretariat for consideration as FAR coverage with Governmentwide application. In the event that similar FAR coverage is issued, HUD will rescind the corresponding HUDAR text.

PART 2425—TRADE AGREEMENTS ACT

Authority: 42 U.S.C. 3535(d).

2425.402 Policy.

It is the Department's policy to determine whether the Trade Agreements Act applies based on the total estimated dollar value of the proposed acquisition before the solicitation is issued, including all line items and options.

PART 2426—OTHER SOCIOECONOMIC PROGRAMS

47. That authority citation for 48 CFR part 2426 is added to read as follows:

Authority: 40 U.S.C. 486(c); 42 U.S.C. 3535(d).

2426.201 [Amended]

48. Section 2426.201 is amended by removing the term "OSDBU", wherever it appears, and inserting in its place the words "Deputy Assistant Secretary for Intergovernmental Relations, in coordination with OSDBU".

SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS

PART 2428—BONDS AND INSURANCE

49. The authority citation for 48 CFR part 2428 is revised to read as follows:

Authority: 40 U.S.C. 486(c); 42 U.S.C. 3535(d).

2428.203 and 2428.203–70 [Redesignated as 2428.204 and 2428.204–70]

50. Sections 2428.203 and 2428.203–70 are redesignated as sections 2428.204 and 2428.204–70, respectively.

PART 2432—CONTRACT FINANCING

51. The authority citation for 48 CFR part 2432 is revised to read as follows:

Authority: 31 U.S.C. 3901–3906; 40 U.S.C. 486(c); 42 U.S.C. 3535(d).

52. Section 2432.402 is revised to read as follows:

2432.402 General.

(e)(1) The Determination and Findings required by FAR 32.402(c)(1)(iii) shall be made by the Director, Office of Procurement and Contracts for Headquarters contracts, or the Director of Administration, for Regional/Field contracts.

(2) Each advance payment situation shall be coordinated with the Office of Finance and Accounting, for Headquarters, or the Regional Accounting Division, for Regional/Field contracts, before authorization may be given, to ensure that there are controls in place to assure proper administration of advance payments.

53. A new section 2432.906 is added to subpart 2432.9, to read as follows:

2432.906 Contract financing payments.

Periods for payment shorter than 30 days shall not be specified in contracts without the prior approval of the Office of Finance and Accounting, for Headquarters contracts, and shall be coordinated with the Regional Accounting Division, for Regional/Field Office contracts, to ensure that procedures are in place to allow timely payment.

PART 2433—PROTESTS, DISPUTES, AND APPEALS

54. The authority citation for 48 CFR part 2433 is revised to read as follows:

Authority: 31 U.S.C. 3551–3556; 40 U.S.C. 486(c); 42 U.S.C. 3535(d).

55. Section 2433.103 is revised to read as follows:

2433.103 Protests to the agency.

(a)(2) When the Contracting Officer makes a determination to award a contract notwithstanding a protest, as authorized by FAR 33.103(a)(2), that determination shall be approved by the HCA before award, after consultation with the Office of General Counsel.

(a)(4) Protests received after award that are filed only with the Department shall be decided promptly by the Contracting Officer after consultation with appropriate officials, including the program office and the Office of General Counsel.

2433.103–70. [Removed]

56. Section 2433.103–70 is removed.

2433.103–71 [Redesignated as 2433.103–70]

57. Section 2433.103–71 is redesignated as section 2433.103–70.

2433.104 [Amended]

58. Section 2433.104 is amended by redesignating paragraph (f) as paragraph (g).

2433.104–70 [Removed]

59. Section 2433.104–70 is removed.

SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING

PART 2436—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

60. The authority citation for 48 CFR part 2436 is revised to read as follows:

Authority: 40 U.S.C. 286(c); 42 U.S.C. 3535(d).

2436.602–2 [Amended]

61. Section 2436.602–2(a) is amended by adding the words "(which may

include preselection boards)" after the words "permanent or ad hoc" in the first sentence, and by adding paragraph (a)(3) to read as follows:

2436.602–2 Evaluation boards.

(a) * * *

(3) *Regional Program Office Director* for boards appointed at the Regional Office level.

* * * * *

2436.602–4 [Amended]

62. Section 2436.602–4 is revised to read as follows:

2436.602–4 Selection authority.

(a) The final selection decision shall be made by the appropriate Primary Organization Head (Headquarters), the appropriate Field Office Manager (Field), or the appropriate Regional Program Office Direction (Region).

2436.602–5 [Amended]

63. Section 2436.602–5 is amended by replacing the number "$10,000" with the words "the small purchase limitation".

PART 2437—SERVICE CONTRACTING

64. The authority citation for 48 CFR part 2437 is revised to read as follows:

Authority: 40 U.S.C. 486(c); 42 U.S.C. 3535(d).

Subpart 2437.2—Advisory and Assistance Services

65. Subpart 2437.2 is retitled to read as set forth above.

2437.110 [Amended]

66. In section 2437.110, new paragraphs (g) and (h) are added to read as follows:

2437.110 Solicitation provisions and contract clauses.[4]

* * * * *

(g) The contracting officer shall insert the clause at 2452.237–76 in solicitations and contracts that involve work on or access to sensitive automated systems.

(h) The Contracting Officer shall insert the clause at 2452.237–77, Observance of Legal Holidays and Administrative Leave, in all solicitations and contracts where contractor personnel will be working on-site in any HUD office.

[4] The HUDAR provisions in paragraphs (g) and (h) of this section have been submitted to the FAR Secretariat for consideration as FAR coverage with Governmentwide application. In the event that similar FAR coverage is issued, HUD will rescind the corresponding HUDAR text.

2437.205 [Amended]

67. In section 2437.205, paragraph (b)(6) is amended by removing the words "consulting services" wherever they appear, and adding in their place the words "advisory and assistance services".

SUBCHAPTER G—CONTRACT MANAGEMENT

PART 2446—QUALITY ASSURANCE

68. The authority citation for 48 CFR part 2446 is revised to read as follows:

Authority: 40 U.S.C. 486(c); 42 U.S.C. 3535(d).

69. A new subpart 2446.7 consisting of section 2446.710 is added to read as follows:

Subpart 2446.7—Warranties

2446.710 Contract clauses.

(c)(1) The contracting officer may include a clause substantially the same as FAR 52.246–19, Warranty of Systems and Equipment under Performance Specifications or Design Criteria, whenever it is in the Government's interest.

SUBCHAPTER H—CLAUSES AND FORMS

PART 2452—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

70. The authority citation for 48 CFR part 2452 is revised to read as follows:

Authority: 40 U.S.C. 486(c); 42 U.S.C. 3535(d).

71. A new section 2452.203–70 is added to read as follows:

2452.203–70 Prohibition against the use of Federal employees.[5]

As prescribed in 2403.670, insert the following clause in solicitations and contracts:

PROHIBITION AGAINST THE USE OF FEDERAL EMPLOYEES

December 1992

In accordance with Federal Acquisition Regulation 3.601, contracts are not to be awarded to Federal employees or a business concern or other organization owned or substantially owned or controlled by one or more Federal employees. For the purposes of this contract, this prohibition against the use of Federal employees includes any work performed by the Contractor or any of its employees, subcontractors, or consultants.

[End of clause]

72. A new section 2452.203–71 is added to read as follows:

[5] This HUDAR clause has been submitted to the FAR Secretariat for consideration as FAR coverage with Governmentwide application. In the event that similar FAR coverage is issued, HUD will rescind the corresponding HUDAR text.

2452.203–71 Certification regarding Federal employment.[6]

As prescribed in 2403.670, insert the following provision in solicitations:

CERTIFICATION REGARDING FEDERAL EMPLOYMENT

December 1992

By submitting an offer, the offeror hereby certifies that it is not owned or substantially owned or controlled by one or more Federal employees.

[End of provision]

(Approved by the Office of Management and Budget under control number 2535–0091).

2452.215–70 [Amended]

73. In 2452.215–70, paragraph (b) of the provision is amended by adding a new Section 6 to the end of the paragraph, and by revising paragraphs (c) and (d), to read as follows:

2452.215–70 Proposal content and outline.

* * * * *

(b) Part I—Technical and Management.

* * * * *

Section 6: *Security Investigation.* The offered shall address in its technical proposal how it intends to manage the security of automated systems as required by HUDAR clause 2452.237–76. This includes developing security procedures, requesting background investigations for employees and subcontractors as required, and requesting investigations for replacements of such individuals as necessary due to turnover, rotation, or other reasons.[7]

(c) *Part II—Cost and Pricing Data.*

(1) Furnish cost or pricing data using the SF–1411, Contract Pricing Proposal, provided in Section L of this solicitation, and the instructions attached to it, which are also printed at FAR 15.804–6. Round all amounts to the nearest dollar. Your data will be subject to review and evaluation by various Government personnel, and thus the estimates furnished on the SF–1411 should be supported by the required supplemental data so that the review and evaluation can be conducted with a minimum amount of delay and effort. In particular, ensure that the following essential elements are provided:

(i) A summary of total cost by cost element cross-reference to each proposed contract line item (instruction number 1).

(ii) Identification of the basis for the kinds, quantities, and cost of all material elements proposed; and a consolidated priced summary of individual material quantities, or a consolidated price bill of material (BOM), for the entire proposal. A well prepared BOM includes: part number/description, unit cost,

[6] This HUDAR provision has been submitted to the FAR Secretariat for consideration as FAR coverage with Governmentwide application. In the event that similar FAR coverage is issued, HUD will rescind the corresponding HUDAR text.

[7] This provision (Section 6) has been submitted to the FAR Secretariat for consideration as FAR coverage with Governmentwide application. In the event that similar FAR coverage is issued, HUD will rescind the corresponding HUDAR text.

quantity required, any nonrecurring costs, extended costs, and basis for the proposed price (quotation, prior buy, similar item, etc.) (instruction number 1, Materials).

(iii) For each subcontract over $100,000 show: source, deliverable, quantity, price, type of subcontract, degree of competition, basis for selecting vendor and establishing reasonableness of price. When required, the subcontractor's cost or pricing data must be submitted with the offeror's initial proposal. If available and if required by FAR 15.806, the contractor should provide the results of review and evaluation of subcontract proposals. Though not required, the offeror should provide reasons for omitted data/reviews with dates when data/reviews will be available (instruction number 1, Materials).

(iv) A justification, submitted on an SF–1412, Claim for Exemption from Submission of Certified Cost or Pricing Data, when claiming an exemption from submitting cost or pricing data (instruction number 1, Materials).

(v) A time phased, e.g., quarterly, annual, breakdown of labor rates and hours by category or skill level, and the basis for the estimates of rates and hours, e.g., historical experiences, engineering estimates, learning curves, etc. If labor is the allocation base for indirect costs, summarize for each overhead pool and year (instruction number 1, Director Labor).

(vi) In the absence of a forward pricing rate agreement or indirect rate proposal, the contractor should show how indirect rates were estimated and applied as a basis for evaluating the reasonableness of the proposed rates. Support for the indirect rates could consist of cost breakdowns, trends, and budgetary data (instruction number 1, Indirect Costs).

(vii) Identification of all other costs by category and basis for pricing (instruction number 1, Other Costs).

(viii) When claiming costs of money, the contractor must submit Form CASB CMF and show the calculation of the proposed amount (instruction number 1, Facilities Capital Cost of Money).

(ix) Identification of cost or pricing data, i.e., data that are verifiable and factual, and an explanation of the estimating process. When applicable, the following items should be specifically identified:

(A) Judgmental factors and the methods used in the estimate, including those used in projecting from known data; and

(B) The nature and amount of any contingencies (instruction number 2).

(x) An index referencing all cost or pricing data and information accompanying or identified in the proposal (instruction number 4).

(xi) For change order proposals: an estimate of the cost to complete deleted work not yet performed; identification of the actual or estimated cost of deleted work already performed; and an estimate of the cost of work added (instruction number 7B).

(2) The Offeror Representations and Certifications provided in Section K of this solicitation shall be included in this Part II—Cost and Pricing Data of your proposal.

(d) Proposals shall be submitted in _____copies of Part I and ____copies of Part II.

(End of provision)

(Approved by the Office of Management and Budget under control number 2535–0091.)

2452.215–71 [Removed]

74. Section 2452.215–71, DUNS contractor establishment number, is removed.

2452.216–75 [Amended]

75. In section 2452.216–75, the introductory text is revised to read as follows:

2452.216–75 Unpriced task orders.

As prescribed in 2416.504(e), insert the following clause:

* * * * *

76. Section 2452.219–70 is added to read as follows:

2452.219–70 Small Business and Small Disadvantaged Business[a] Subcontracting Plan

As prescribed in 2419.708, insert the following provision:

SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS SUBCONTRACTING PLAN DECEMBER 1992

(a) This provision is not applicable to small business concerns.

(b) Consistent with the national interest, it is HUD policy that small business and small business concerns that are owned and controlled by socially and economically disadvantaged individuals shall have the maximum practicable opportunity to participate in the performance of HUD work at the prime and subcontract level. Therefore, any contract awarded as a result of this solicitation shall fully comply with the intent of this policy, and the successful offeror shall agree to pursue an effective and comprehensive small business and small disadvantaged business subcontracting program in compliance with the clause entitled "Utilization of Small Business Concerns and Small Disadvantaged Business Concerns."

(c) Prior compliance with subcontracting plans shall be considered in determining the responsibility of an offeror (see FAR 9.104–3). Therefore, offerors have previous contracts with subcontracting plans shall provide the following information: agency name; agency point of contract; contract number; total contract value; a synopsis of the work required under the contract; the role(s) of the subcontractor(s) involved; and, the applicable goals and actual performance (dollars and percentages) for subcontracting with small and small disadvantaged business concerns. This information shall be provided for the three most recently (within the last three years) completed contracts with such subcontracting plans.

(d) The contract expected to result from this solicitation will contain the clause at FAR 52.219–9, "Small Business and Small Disadvantaged Business Subcontracting Plan." In accordance with that clause, the offeror shall submit the complete subcontracting plan with the response to this solicitation. The content of the final plan is subject to negotiation. Failure to submit a complete subcontracting plan and negotiate its content in good faith shall make the offeror ineligible for the contract award.

(End of provision)

Alternate I December 1992

(a) This provision is not applicable to small business concerns.

(b) Consistent with the national interest, it is HUD policy that small business and small business concerns that are owned and controlled by socially and economically disadvantage individuals shall have the maximum practicable opportunity to participate in the performance of HUD work at the prime and subcontract level. Therefore, any contract awarded as a result of this solicitation shall fully comply with the intent of this policy, and the successful bidder shall agree to pursue an effective and comprehensive small business and small disadvantaged business subcontracting program in compliance with the clause entitled "Utilization of Small Business Concerns and Small Disadvantaged Business Concerns."

(c) Prior compliance with subcontracting plans shall be considered in determining the responsibility of a bidder (see FAR 9.104–3). Therefore, bidders having previous contracts with subcontracting plans shall provide the following information: agency name; agency point of contract; contract number; total contract value; a synopsis of the work required under the contract; the role(s) of the subcontractor(s) involved; and, the applicable goals and actual performance (dollars and percentages) for subcontracting with small and small disadvantaged business concerns. This information shall be provided for the three most recently (within the last three years) completed contracts with such subcontracting plans.

(d) The contract expected to result from this solicitation will contain the clause at FAR 52.219–9, "Small Business and Small Disadvantage Business Subcontracting Plan (Alternate I)." The apparent low bidder, upon request by the Contracting Officer, shall submit a subcontracting plan, where applicable, which addresses separately subcontracting with small business concerns and small disadvantaged business concerns, and which shall be included in and made a part of the resultant contract. The Contracting Officer will review the adequacy of the subcontracting plan as part of the responsibility determination. Failure to submit an adequate subcontracting plan where applicable shall make the bidded ineligible for the contract award.

(Approved by the Office of Management and Budget under control number 2535-0091).

[a] This HUDAR provision has been submitted to the FAR Secretariat for consideration as FAR coverage with Governmentwide application. In the event that similar FAR coverage is issued, HUD will rescind the corresponding text.

77. Section 2452.237-76 is added to read as follows:

2452.237-76 Background investigations for sensitive automated systems/ applications.

As prescribed in 2437.110(g), insert the following clause:

BACKGROUND INVESTIGATIONS FOR SENSITIVE AUTOMATED SYSTEMS/ APPLICATIONS DECEMBER 1992

(A) *General.* This contract involves work on or access to an automated system [name] that has a sensitivity rating of [3 or 4], as defined in Appendix A of HUD Handbook 2400.23, "ADP Security." All contractor employees working on this contract are required to have a background investigation commensurate with the rating of the automated system (position designation of: 6, High Risk; 5, Moderate Risk; or 1, Low Risk) in accordance with Federal Personnel Manual (FPM) Chapters 731, 732, and 736. Any employee who is required to have a background investigation shall not be permitted to work on this contract without the required investigation; however, contractor employees in Low Risk positions are eligible for immediate (interim) approval if the contractor submits the required security package described in paragraph (c) of this section within 14 days of contract award. The contractor shall establish personnel security procedures that meet, as a minimum, the requirements of Handbook 2400.23 and shall provide a copy to the GTR.

(b) *Citizenship-related requirements.* Every contractor employee working on the sensitive applications of this contract shall satisfy at least one of the following requirements: (1) be a citizen living in the U.S.; or (2) owe allegiance to the U.S.

(c) *Approval process.* To obtain a background investigation, the contractor shall submit the following completed forms to the GTR for screening and transmittal to the Office of the Inspector General's (OIG) Security Staff for initiation of the required investigation: SF 85–P, Questionnaire for Public Trust Positions; SF 86A, Continuation Sheet (if needed); SF–171, Application for Federal Employment: FD–258, Fingerprint Chart; and other forms or information as may be necessary. An original and two copies of SF–171 and SF 85–P are necessary. The investigation process shall consist of: a range of personal background inquiries and contacts (written and personal) pertaining to verification of the information provided on the security forms. The background investigation may be waived by HUD upon presentation of acceptable evidence that an employee has received a timely appropriate background investigation.

Upon completion of the investigation process, the Contracting Officer, after conferring with the appropriate HUD offices, shall notify the contractor in writing of the individual's eligibility or ineligibility to work on this contract. The contractor is responsible for ensuring that such investigations are requested as necessary for the performance of this contract. If contractor personnel will be working on-site in any HUD office, the contractor shall comply with the requirements of HUDAR clause 2452.237–75—Clearance of Personnel and obtain building passes for those personnel.

(d) *Signed pledges.* The contractor shall require that any employees who may have access to the automated systems identified in Section C of this contract sign a pledge of nondisclosure of information. These pledges shall be signed by the employees before they are assigned to this contract and shall be maintained by the contractor for a period of three years after final payment under the contract.

(e) *Nondisclosure of information.* Neither the contractor nor any of its employees shall divulge or release data or information developed or obtained during performance of this contract, except to authorized Government personnel with an established need to know or upon written approval of the Contracting Officer. Information contained in all source documents and other media provided by HUD are the sole property of HUD.

(f) *Contract performance.* If HUD receives disqualifying information on a contractor employee, the contractor, upon written notice, will immediately remove the employee from work on this contract. Contractor employees may be barred from working on this contract for failing to meet or maintain the suitability standards prescribed in FPM Chapter 731, as applicable. Failure to comply with the terms of this clause may result in termination for default.

(g) *Notification.* The contractor shall notify the Government Technical Representative (GTR) in writing (with a copy to the contracting officer) whenever a cleared employee terminates employment or is no longer working on this contract, and the GTR shall notify the HUD ADP Security Staff, who will notify the OIG Security Staff. The contractor shall immediately notify the Contracting Officer of any breach or suspected breach of security or any unauthorized disclosure of the information contained in the automated system specified in this contract.

(h) *Subcontracts.* The contractor shall incorporate this clause in all subcontracts where the requirements specified in paragraph (a) of this section are applicable to performance of the subcontract.

[End of clause]

(Approved by the Office of Management and Budget under control number 2535–0091).

78. Section 2452.237–77 is added to read as follows:

2452.237–77 Observance of Legal Holidays and administrative leave.[9]

As prescribed in 2437.110(h), insert the following clause:

[9] This HUDAR clause has been submitted to the FAR Secretariat for consideration as FAR coverage with Governmentwide application. In the event that similar FAR coverage is issued, HUD will rescind the corresponding HUDAR text.

Observance of Legal Holidays and Administrative Leave

December 1992

(a) The Department of Housing and Urban Development observes the following days as holidays:

New Year's Day
Martin Luther King's Birthday
Washington's Birthday
Memorial Day
Independence Day
Labor Day
Columbus Day
Veterans Day
Thanksgiving Day
Christmas Day

Any other day designated by Federal law, Executive Order, or Presidential Proclamation.

(b) When any such day falls on a Saturday, the preceding Friday is observed; when any such day falls on a Sunday, the following Monday is observed. Observances of such days by Government personnel shall not be cause for additional period of performance or entitlement to compensation except as set forth in the contract. If the contractor's personnel work on a holiday, no form of holiday or other premium compensation will be reimbursed either as a direct or indirect cost, unless authorized pursuant to an overtime clause elsewhere in this contract.

(c) When HUD grants administrative leave to its Government employees, assigned contractor personnel in Government facilities shall also be dismissed. However, the contractor agrees to continue to provide sufficient personnel to perform round-the-clock requirements of critical tasks already in operation or scheduled, and shall be guided by the instructions issued by the Contracting Officer or his/her duly authorized representative.

(d) For fixed-price contracts, if services are not required or provided because the building is closed due to inclement weather, unanticipated holidays declared by the President, failure of the Congress to appropriate funds, or similar reasons, deductions will be computed as follows:

(1) The deduction rate in dollars per day will be equal to the per month contract price divided by 21 days per month.

(2) The deduction rate in dollars per day will be multiplied by the number of days services are not required or provided.

If services are provided for portions of days, appropriate adjustment will be made by the Contracting Officer to ensure that the contractor is compensated for services provided.

(e) If administrative leave is granted to contractor personnel as a result of conditions stipulated in any "Excusable Delays" clause of this contract, it will be without loss to the contractor. The cost of salaries and wages to the contractor for the period of any such excused absence shall be a reimbursable item of direct cost hereunder for employees whose regular time is normally charged, and a reimbursable item of indirect cost for employees whose time is normally charged indirectly in accordance with the contractor's accounting policy.

Dated: December 9, 1992.

Jim E. Tarro,

Assistant Secretary for Administration.

[FR Doc. 92–30353 Filed 12–14–92; 8:45 am]

BILLING CODE 4210–01–M

federal register

Tuesday
December 15, 1992

Part XI

Department of Education

Office of Special Education and Rehabilitative Services

Invitation To Comment on the Feasibility and Desirability of Establishing a Nationwide Assistive Technology Information and Program Referral Network; Notice

DEPARTMENT OF EDUCATION

Office of Special Education and Rehabilitative Services

Invitation To Comment on the Final Report, the Feasibility and Desirability of Establishing a Nationwide Assistive Technology Information and Program Referral Network

AGENCY: Department of Education.

ACTION: Notice inviting comments.

SUMMARY: The Secretary of Education invites comments concerning the final report prepared by the University of South Carolina on a study dealing with the feasibility and desirability of establishing a national assistive technology information and program referral network. The comments will be used by the Department to help determine the appropriate action to be taken based on the report.

The Technology-Related Assistance for Individuals with Disabilities Act of 1988 required the Secretary to conduct a study to determine the feasibility and desirability of creating a national information and program referral network and to determine the appropriate structure for the organization and operation of such a network, if it is determined to be feasible and desirable. The statute requires that a contractor-prepared report of the study be submitted to the Secretary and to the appropriate committees of the Congress. In addition, the statute requires the Secretary to solicit public comment on the report and "to take appropriate action based on the report before the end of the 6-month period following the date on which the Secretary receives the report." The report reflects only the views of the contractor and not the views of the Secretary. Comments on the report will help the Secretary determine what actions should be taken based on the report.

DATES: All comments must be received on or before January 14, 1993.

ADDRESSES: Written comments should be addressed to Carol G. Cohen, U.S. Department of Education, 400 Maryland Avenue, SW., room 3420, Switzer Building, Washington, DC 20202–2705.

FOR FURTHER INFORMATION CONTACT: Carol G. Cohen. Telephone (202) 205–5666. Deaf and hearing impaired individuals may call (202) 205–5516 for TDD services.

SUPPLEMENTARY INFORMATION: The following is a synopsis of the final report, "The Feasibility and Desirability of Establishing a Nationwide Assistive Technology Information and Program Referral Network."

Assistive technology (AT) can provide the tools that allow individuals with disabilities to participate more fully in daily activities, gain more control over their own lives, and have greater access to education, employment, and leisure opportunities. This report explores the feasibility and desirability of establishing a national assistive technology information and program referral (ATI&R) network from two perspectives: (1) The current processes used to disseminate information about assistive technology, and (2) the needs of individuals who want access to assistive technology information. It identifies the mechanisms essential to linking information on assistive technology with the individuals who need it.

The report's major conclusion is that a national ATI&R network is feasible and desirable. The proposed network would address disparities found in the current state of ATI&R practices in the following areas—

- The delivery of information services;
- Individual access to information;
- The quality of information provided;
- Information management methods; and
- An understanding of the benefits of assistive technology.

This report synthesizes the results of the full study funded by the National Institute on Disability and Rehabilitation Research, U.S. Department of Education. The study's five key findings are:

1. Assistive technology information services are not uniformly defined;
2. Organizational structure of assistive technology and program referral services are not uniform from program to program;
3. Training for assistive technology and program referral staff is flawed by the lack of standards and/or requirements for ATI&R for staff;
4. Information management is flawed by the lack of consistent methods to maintain, verify, and update information; and
5. Outreach efforts to target populations are ineffective and/or non-existent.

On the basis of these findings, the study made a number of recommendations to the National Institute on Disability and Rehabilitation Research, including:

1. Develop a national classification "taxonomy" for the delivery of ATI&R services;
2. Provide leadership to develop a Nationwide Assistive Technology Information and Program Referral Coordinating Institute;
3. Establish annual priorities for field-initiated research on the "best practices" in the delivery of ATI&R services;
4. Develop mechanisms for sharing training materials, innovative approaches, strategies, and technical applications;
5. Establish a mechanism to provide technical support and training on outreach strategies with formal and informal brokers; and
6. Initiate local community promotional campaigns that parallel a national assistive technology awareness campaign. Local community promotional campaigns can include public service announcements, video productions, and printed media.

This synopsis provides an overview of the results of the study. The complete findings and recommendations are summarized in the Executive Summary and Final Report of the study. Interested parties should examine the report for a more complete understanding of the issues affecting the feasibility and desirability of establishing a nationwide assistive technology information and program referral network.

The final report, "The Feasibility and Desirability of Establishing a Nationwide Assistive Technology Information and Program Referral Network," is available for review at the National Institute on Disability and Rehabilitation Research, Department of Education, 330 C Street, SW., room 3420, Switzer Building, Washington, DC 20202–2705, Telephone: (202) 205–5666. Deaf and hearing impaired individuals may call (202) 205–5516 for TDD services.

Copies of the final report can be obtained upon request from the National Institute on Disability and Rehabilitation Research.

Robert Davila,

Assistant Secretary, Office of Special Education and Rehabilitative Services.

[FR Doc. 92–30346 Filed 12–14–92; 8:45 am]

BILLING CODE 4000–01–M

federal register

Tuesday
December 15, 1992

Part XII

Department of Labor

Employment and Training Administration

20 CFR Part 614

Unemployment Compensation for Ex-servicemembers; Interim Final Rule

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 614

RIN 1205–AA26

Unemployment Compensation for Ex-servicemembers

AGENCY: Employment and Training Administration, Labor.

ACTION: Interim final rule; request for comments.

SUMMARY: The Employment and Training Administration of the Department of Labor is issuing this interim final rule incorporating the statutory amendments contained in the Emergency Unemployment Compensation Act of 1991 affecting the Unemployment Compensation for Ex-servicemembers (UCX) Program. These statutory amendments change the criteria for determining Federal service for UCX qualifying purposes as well as affect the waiting period and maximum amount of UCX benefits payable. Essential amendments to the regulations are issued as an interim final rule because the statutory changes in the program became effective for weeks of unemployment beginning on or after November 15, 1991, the date of enactment of the public law.

Finally, in a prior amendment to the regulations on October 17, 1988, a section relating to the Veterans Administration was inadvertently not deleted from the regulations and is now deleted in this rulemaking.

To provide an opportunity for public participation in this rulemaking, a comment period is provided, and a final rule will be published after taking into account comments received.

DATES: *Effective date:* The effective date of this interim final rule is January 14, 1993.

Comment date: Written comments on this interim final rule must be received in the Department of Labor on or before January 14, 1993.

ADDRESSES: Written comments on this interim final rule may be mailed or delivered to Mary Ann Wyrsch, Director, Unemployment Insurance Service, U.S. Department of Labor, room S–4231, Frances Perkins Building, 200 Constitution Ave., NW., Washington, DC 20210.

All comments received will be available for public inspection during normal business hours in room S–4231 at the above address.

FOR FURTHER INFORMATION CONTACT: Sandra T. King, Chief, Division of Program Development and Implementation, or Robert J. Gillham, Chief, Federal Programs Group, Office of Program Management, Unemployment Insurance Service, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Ave. NW., Washington, DC 20210, telephone (202) 219–5309 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: The UCX program is financed with Federal funds to furnish unemployment benefits to eligible individuals who are separated from the Armed Forces and are unable to obtain work. The program, created by Public Law 85–848, approved on August 28, 1958, has been codified at 5 U.S.C. 8521–8525.

The UCX amendments contained in section 301 of the Emergency Unemployment Compensation Act of 1991 (Pub. L. 102–164) took effect for weeks of unemployment beginning on or after November 15, 1991, the date of enactment of Public Law 102–164. The Department has determined, pursuant to 5 U.S.C. 553(b)(3)(B), that good cause exists for publishing the amendments to 20 CFR part 614 as an interim final rule, with a post publication comment period, because prompt action is necessary to assure that the Department has regulations in place to carry out its responsibilities for the UCX program. The changes in this document are essential to the proper administration of the UCX program by the States. Therefore, a pre-publication comment period is impracticable and contrary to the public interest.

This document amends 20 CFR part 614 to incorporate statutory amendments to the UCX Program. Operating instructions for implementing these statutory amendments were issued by the Department on November 22, 1991, in General Administration Letter (GAL) No. 3–92, published at 56 FR 67333 (December 30, 1991). The operating instructions in GAL 3–92 supplement these amendments to 20 CFR part 614.

Sections 301(a) and 301(b) of the Emergency Unemployment Compensation Act of 1991 (Pub. L. 102–164) amended 5 U.S.C. 8521, which affect entitlement to UCX. Section 301(a) repealed 5 U.S.C. 8521(c) which required a 4-week waiting period and a 13-week maximum for payment of UCX benefits. Section 301(b) amended 5 U.S.C. 8521(a) by reducing the amount of active duty in a reserve status from 180 continuous days to 90 continuous days necessary to be considered "Federal service" for UCX qualifying purposes.

Section 301(c) of Public Law 102–164 provides that the UCX amendments contained in section 301 are effective for weeks of unemployment beginning on or after November 15, 1991, the date of enactment of Public Law 102–164. This means that the UCX amendments contained in section 301 shall be effective for all UCX initial claims filed for weeks of unemployment beginning on or after November 15, 1991, as well as for weeks of unemployment beginning on or after November 15, 1991, for unexpired UCX claims.

Furthermore, the Department interprets the amendment in section 301(b) of Public Law 102–164 to apply to previously denied UCX claims of reservists who had less than 180 but at least 90 days of continuous active duty in a reserve status, for weeks of unemployment beginning on or after November 15, 1991. Thus, the application of the UCX amendments in sections 301(a) and 301(b) to unexpired UCX claims requires redetermination of those claims, and such redeterminations have already been completed pursuant to operating instructions issued to the States soon after the enactment of the amendments. It was emphasized, however, that in making those redeterminations, the UCX amendments are applicable only for weeks of unemployment beginning on or after November 15, 1991 as provided by section 301(c).

Further, many reservists may have had 90 days or more of continuous active duty in a reserve status, but did not file UCX claims because they had less than 180 days of such service.

Accordingly, in order to effectuate these statutory amendments, the Department has determined that the application of the State time limitations on claims filing will be limited, as explained below. The general rule is that State law is followed on procedural matters (i.e., claims filing, determinations and redeterminations) unless inconsistent with Federal law. Here, applying State time limitations on claims filing would thwart the purpose of these statutory amendments. It is Congress' intent to cover Desert Shield and Desert Storm veterans under the UCX amendments made by section 301 of Public Law 102–164.

The effective date of the UCX amendments as provided in the language of section 301(c) carries out this Congressional intent. Section 301(c) clearly provides that UCX amendments apply to weeks of unemployment, rather than to new claims filed, on and after the date of enactment. Furthermore, the Congressional record regarding these amendments expresses Congress' intent

to include Desert Shield and Desert Storm veterans in the amendment's coverage. The only way to extend the UCX amendments to Desert Shield and Desert Storm veterans is to require States and cooperating State agencies to redetermine all UCX claims for claimants whose benefit year expired after November 15, 1991. Thus, this Federal law authority will ensure a uniform application of the UCX amendments as intended by Congress.

Also, States and cooperating State agencies will not apply State law claims filing time limitations to reservists who did not previously file UCX claims because they had less than 180 days of continuous active duty in a reserve status, where the claimant's benefit year would have expired on or after November 15, 1991, if he/she had filed a UCX claim. However, State law provisions regarding back-dating of claims apply to UCX first claims.

Once a UCX claimant meets the qualifying requirements of 5 U.S.C. 8521, as amended by section 301 of Public Law 102–164, it is the Congressional intent to treat UCX claimants for weeks of unemployment beginning on or after November 15, 1991 under the same terms and conditions as apply to claimants covered under the applicable State UI law.

In a prior amendment to these regulations, published at 53 FR 40550 (October 17, 1988), § 614.27 was amended to delete the reference to Veterans Administration and was redesignated § 614.25. However, § 614.27 was inadvertently not deleted from the regulations. Consequently, § 614.27 is removed.

The following amendments are made to the regulations pursuant to the Emergency Unemployment Compensation Act of 1991:

1. Section 614.2, paragraph (g), is amended by reducing the amount of active duty in a reserve status necessary to be considered Federal service for UCX qualifying purpose from 180 continuous days to 90 continuous days. Also, paragraph (g)(2) is deleted as outdated and unnecessary. Paragraph (g)(1) then becomes paragraph (g).

2. Section 614.3, paragraph (e), is removed so as to reflect the repeal of 5 U.S.C. 8521(c) which required a 4-week waiting period. For weeks of unemployment beginning on or after November 15, 1991, States must follow the waiting period provisions of applicable State law.

3. Section 614.4, paragraphs (c) and (d), are amended to reflect that the 13-week maximum amount of UCX benefits payable in a benefit year to an individual has been eliminated by the repeal of 5 U.S.C. 8521(c). Therefore, the UCX maximum amount of benefits payable in a benefit year will be the same as provided under the applicable State law as if the claimant's Federal military service and Federal military wages had been included as employment and wages under the State law.

4. Other technical and conforming changes are made in part 614.

Classification—Executive Order 12291

The rule in this document is not classified as a "major rule" under Executive Order 12291 on Federal Regulations, because it is not likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. Accordingly, no regulatory impact analysis is required.

Paperwork Reduction

The rule in this document will not increase the Federal paperwork burden on the private or public sectors under the Paperwork Reduction Act. The reason for such certification is that this rule only incorporates statutory amendments to an individual entitlement program and which only affect individuals applying for benefits under the UCX Program.

Regulatory Flexibility Act

The proposed rule will have no "significant economic impact on a substantial number of small entities" within the meaning of section 3(a) of the Regulatory Flexibility Act, Public Law 96–354, 91 Stat. 1164 (5 U.S.C. 605(b)). The Secretary has certified to the Chief Counsel for Advocacy of the Small Business Administration to this effect. The definition of the term "small entity" under 5 U.S.C. 601(6) does not include States or individuals. Since these regulations involve an entitlement program for individuals administered by the States, and are directed to the States, no regulatory flexibility analysis is required. Accordingly, no regulatory flexibility analysis is required.

List of Subjects in 20 CFR Part 614

Labor, Unemployment Compensation for Ex-servicemembers (UCX), Unemployment Compensation.

Words of Issuance

For the reasons set out in the preamble, part 614 of chapter V of title 20 of the Code of Federal Regulations is amended as follows:

PART 614—[AMENDED]

1. The authority citation for part 614 continues to read as follows:

Authority: 5 U.S.C. 8508; Secretary's Order No. 4–75 (40 FR 18515).

§ 614.1 [Amended]

2. Section 614.1 is amended by removing from paragraph (a) the following phrase "as amended by sec. 201 of Public Law 97–362, 96 Stat. 1732,".

3. Paragraph (g) of § 614.2 is revised to read as follows:

§ 614.2 Definitions of terms.

* * * * *

(g) *Federal military service* means active service (not including active duty in a reserve status unless for a continuous period of 90 days or more) in the Armed Forces or the Commissioned Corps of the National Oceanic and Atmospheric Administration if with respect to that service—

(1) The individual was discharged or released under honorable conditions (and, if an officer, did not resign for the good of the service); and

(2)(i) The individual was discharged or released after completing his/her first full term of active service which the individual initially agreed to serve, or

(ii) The individual was discharged or released before completing such term of active service—

(A) For the convenience of the Government under an early release program,

(B) Because of medical disqualification, pregnancy, parenthood, or any service-incurred injury or disability,

(C) Because of hardship, or

(D) Because of personality disorders or inaptitude but only if the service was continuous for 365 days or more.

* * * * *

§ 614.2 [Amended]

4. In addition to the amendment to § 614.2 set forth above, paragraph (p)(1) of § 614.2 is amended by removing, in two places, the words "Internal Revenue Code of 1954" and adding, in their place, the words "Internal Revenue Code of 1986".

5. Section 614.3 is amended by removing paragraph (e), and revising paragraphs (c) and (d) to read as follows:

§ 614.3 Eligibility requirements for UCX.

* * * * *

(c) The individual has filed an initial claim for UCX and, as appropriate, has filed a timely claim for waiting period credit or payment of UCX with respect to that week of unemployment; and

(d) The individual is totally, part-totally, or partially unemployed, and is able to work, available for work, and seeking work within the meaning of or as required by the applicable State law, and is not subject to disqualification under this Part or the applicable State law, with respect to that week of unemployment.

6. Paragraphs (c) and (d) of § 614.4 are revised to read as follows:

§ 614.4 Weekly and maximum benefit amounts.

* * * * *

(c) *Maximum amount.* The maximum amount of UCX which shall be payable to an eligible individual during and subsequent to the individual's benefit year shall be the maximum amount of all unemployment compensation that would be payable to the individual as determined under the applicable State law.

(d) *Computation rules.* The weekly and maximum amounts of UCX payable to an individual under the UCX Program shall be determined under the applicable State law to be in the same amount, on the same terms, and subject to the same conditions as the State unemployment compensation which would be payable to the individual under the applicable State law if the individual's Federal military service and Federal military wages assigned or transferred under this Part to the State had been included as employment and wages covered by that State law, subject to the use of the applicable Schedule of Remuneration.

§ 614.27 [Removed]

7. Section 614.27 is removed.

Signed at Washington, DC on December 10, 1992.

Roberts T. Jones,

Assistant Secretary of Labor.

[FR Doc. 92–30416 Filed 12–14–92; 8:45 am]

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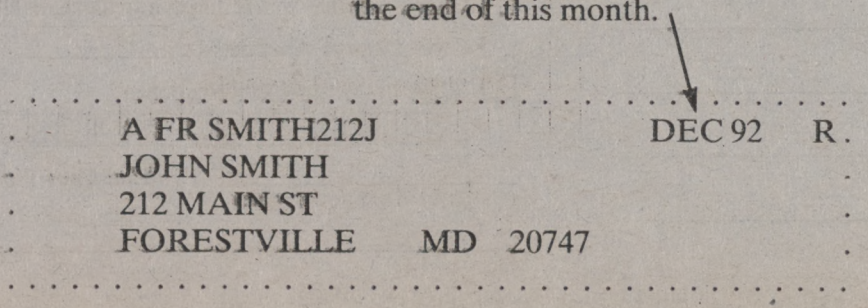
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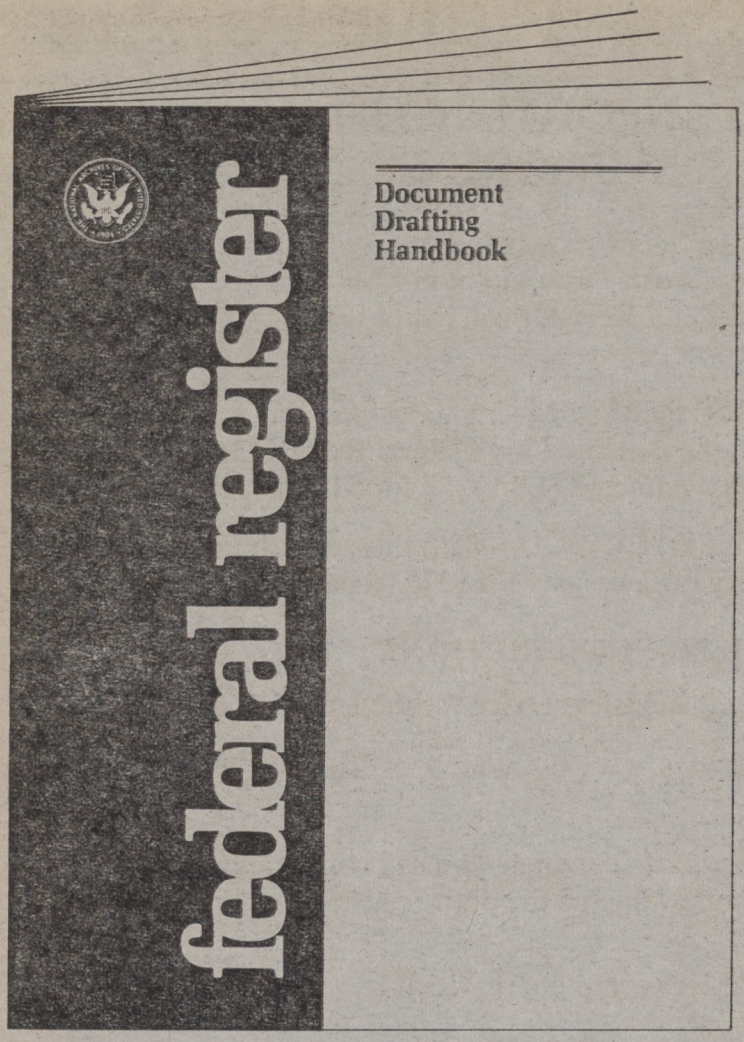
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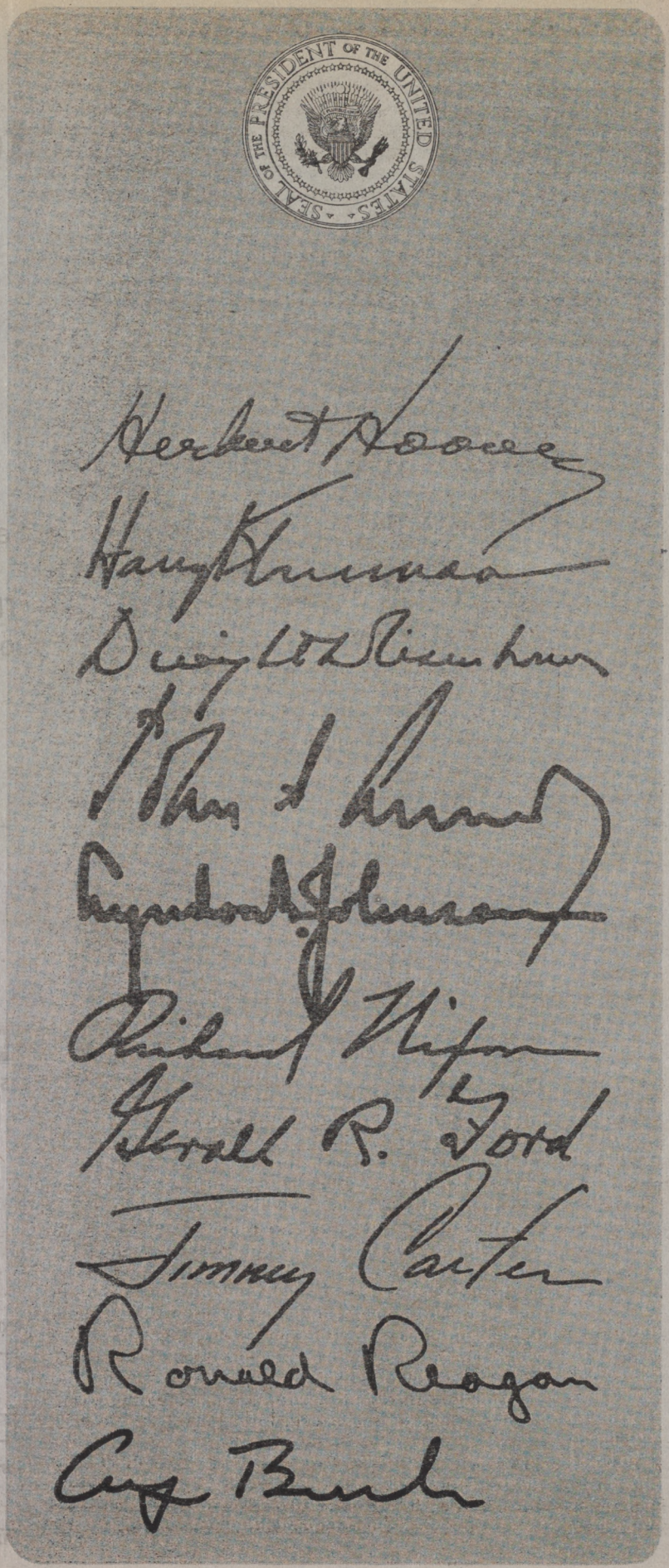
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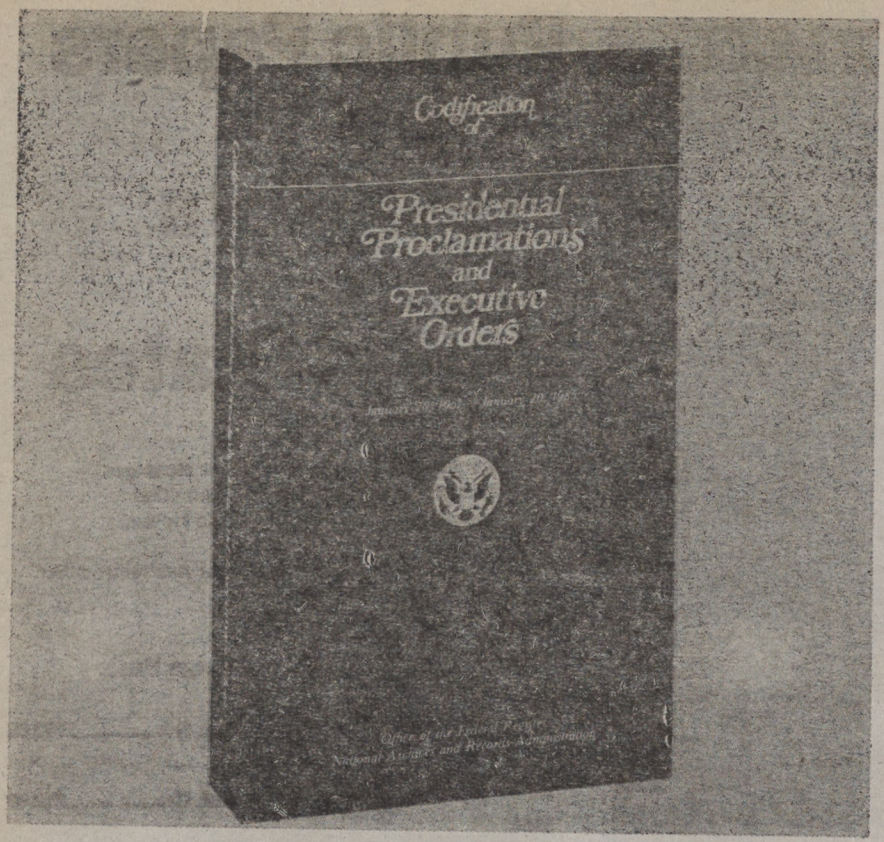
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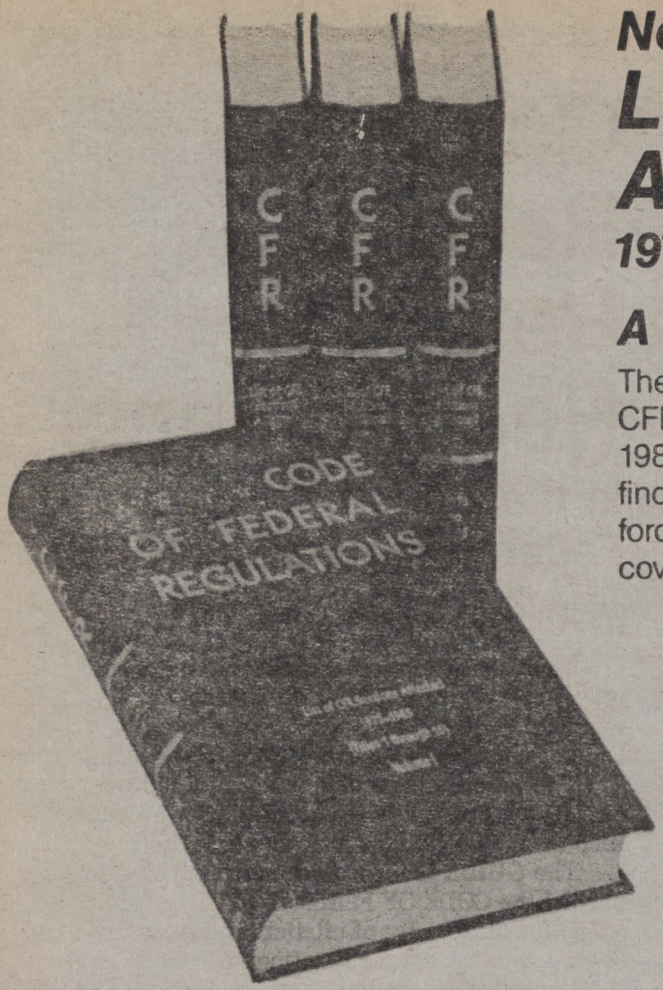
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